United States

Merit Systems Protection Board

Annual Report for FY 2012

January 31, 2013

This page intentionally left blank.

Foreword

In accordance with section 1206 of Title 5, United States Code (U.S.C.), the U.S. Merit Systems Protection Board (MSPB) submits this annual report on its significant actions during fiscal year (FY) 2012. This report includes summaries of the most significant Board decisions, relevant opinions issued by our reviewing courts during the year, case processing statistics, summaries of MSPB's merit systems studies, and a summary of MSPB's financial results. The report also contains a review of OPM significant actions and examines whether those actions are in accord with merit system principles and free from prohibited personnel practices. The review of OPM significant actions conducted under 5 U.S.C § 1206 is not, and should not be construed as, an advisory opinion (which is prohibited under 5 U.S.C. § 1204(h)). In addition, where there have been significant MSPB activities since the end of the fiscal year, the report includes updated information as a service to the reader.

Additional information about FY 2012 program performance results will be available in the Annual Performance Report and Plan (APRP) published in conjunction with the Congressional Budget Justification. Financial accountability and audit information is included in MSPB's Annual Financial Report (AFR), published in November. MSPB Annual Reports and APRPs are posted on MSPB's website, www.mspb.gov, when they are released.

This page intentionally left blank.

Table of Contents

This page intentionally left blank.

U.S. Merit Systems Protection Board
Fiscal Year 2012 Annual Report

Introduction

In accordance with section 1206 of Title 5, United States Code, the MSPB annual report provides information on MSPB's significant actions during fiscal year (FY) 2012. The report includes summaries of the most significant Board decisions and relevant Court opinions issued during the year, case processing statistics, summaries of MSPB's merit systems studies, and summaries of the significant actions of the Office of Personnel Management (OPM). In addition, this report includes a summary of the first comprehensive revision of MSPB adjudication regulations in 5 C.F.R. 1200, 1201, 1203, 1208, 1209 since MSPB's founding. The report contains summaries of the Board's financial status, legislative and congressional relations activities, international activities, internal management issues, and the external factors that affect our work. When there have been significant activities or events since the end of the FY, the report includes updated information as a service to its stakeholders.

About MSPB

MSPB has its origin in the Pendleton Act of 1883, which was passed following the assassination of President Garfield in 1881 by a frustrated Federal job seeker. The Pendleton Act created the Civil Service Commission (CSC) and provided the foundation for improvements in Government efficiency and effectiveness by helping to ensure that a stable, highly qualified Federal workforce, free from partisan political pressure, was available to provide effective service to the American people.

Over time, it became clear that the CSC could not properly, adequately, and simultaneously set managerial policy, protect the merit systems, and adjudicate employee appeals. Concern over the inherent conflict of interest in the CSC's role as both rule-maker and judge was a principal motivating factor behind the passage of the Civil Service Reform Act of 1978 (CSRA). The CSRA replaced the CSC with three new agencies: MSPB as the successor to the Commission; the Office of Personnel Management (OPM) to serve as the President's agent for Federal workforce management policy and procedure; and the Federal Labor Relations Authority (FLRA) to oversee Federal labor-management relations.[1]

MSPB inherited the adjudication functions of the CSC by providing due process to employees and agencies as an independent, third-party adjudicatory authority for employee appeals of adverse actions and retirement decisions. Since the CSRA, Congress has given jurisdiction to MSPB to hear cases and complaints filed under a variety of other laws.[2] MSPB was given the authority to develop its adjudicatory processes and procedures, issue subpoenas, call witnesses, and enforce compliance with final MSPB decisions. MSPB was also granted broad new authority to conduct independent,

[1] Bogdanow, M., and Lanphear, T., History of the Merit Systems Protection Board, Journal of the Federal Circuit Historical Society, Volume 4, 2010.

[2] Including the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunity Act (VEOA), 5 U.S.C. § 3309 *et seq.*; the Whistleblower Protection Act (WPA), Pub. L. No. 101-12, 103 Stat. 16; 5 U.S.C. § 4304; 5 U.S.C. § 7513; and those set out at 5 C.F.R. § 5 Code of Federal Regulations (C.F.R.) § 1201.3.

objective studies of the Federal merit systems and Federal human capital management issues. In addition, MSPB was given the authority and responsibility to review and act on the regulations of OPM and review and report on the significant actions of OPM.[3] The CSRA also codified for the first time the values of the merit systems as the merit system principles (MSPs) and delineated specific actions and practices as the prohibited personnel practices (PPPs) that were proscribed because they were contrary to merit system values.[4]

Board Members

The bipartisan Board consists of the Chairman, Vice Chairman, and Board Member, with no more than two of its three members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping, non-renewable 7-year terms.

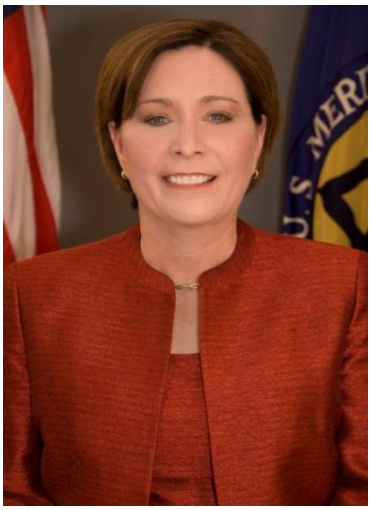
SUSAN TSUI GRUNDMANN
Chairman
November 2009 to Present

Susan Tsui Grundmann was nominated by President Barack Obama to serve as a Member and Chairman of the U.S. Merit Systems Protection Board on July 31, 2009. She was confirmed by the U.S. Senate on November 5, 2009, and sworn in on November 12, 2009. Chairman Grundmann's term expires on March 1, 2016.

Previously, Ms. Grundmann served as General Counsel to the National Federation of Federal Employees (NFFE), which represents 100,000 Federal workers nationwide and is affiliated with the International Association of Machinist and Aerospace Workers. At NFFE, she successfully litigated cases in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia. In 2004, Ms. Grundmann represented NFFE and other labor unions in the statutory "meet and confer" process with officials from the Department of Homeland Security (DHS) and OPM, which sought agreement on how to proceed with new DHS personnel regulations. She represented NFFE and the United Department of Defense Workers Coalition, consisting of 36 labor unions, and served on the Coalition's litigation team in a coordinated response to proposed personnel changes at the Department of Defense (DoD). In addition to DoD employees, Ms. Grundmann represented employees in the Forest Service, Department of Agriculture, Passport Service, Veterans Administration, General Services Administration, and some 25 additional Federal agencies. From 2003 to 2009, she was a regular instructor on Federal sector labor and employment law at the William W. Winpisinger Education Center in Placid Harbor, Maryland. Prior to joining NFFE, Ms. Grundmann served as General Counsel to the National Air Traffic Controllers Association. She began her legal career as a law clerk to the judges of the Nineteenth Judicial Circuit of Virginia, and later worked in both private practice and at the Sheet Metal Workers National Pension Fund. Chairman Grundmann earned her undergraduate degree at American University and her law degree at Georgetown University Law Center.

[3] Pursuant to Title 5 U.S.C. § 1204(f), MSPB may on its own motion, or at the request of other parties, review and declare invalid OPM regulations if such regulations, or the implementation of such regulations, would require an employee to commit a PPP. Pursuant to 5 U.S.C. § 1206, MSPB is also responsible for annually reviewing and reporting on the significant actions of OPM.

[4] Title 5 U.S.C. § 2301 and § 2302, respectively.



ANNE M. WAGNER
Vice Chairman
November 2009 to Present

Anne M. Wagner was nominated by President Barack Obama to serve as a Member of the U.S. Merit Systems Protection Board with the designation of Vice Chairman on July 31, 2009. Her nomination was confirmed by the U.S. Senate on November 5, 2009, and she was sworn in November 12, 2009. Ms. Wagner's term expires on March 1, 2014.

Ms. Wagner came to the Merit Systems Protection Board after serving as General Counsel of the Personnel Appeals Board of the U.S. Government Accountability Office (GAO). Prior to that, Ms. Wagner was appointed by the U.S. Comptroller General to serve a five-year statutory term as a Member of the GAO Personnel Appeals Board. Ms. Wagner began her career as a staff attorney in the Office of the General Counsel of the General Services Administration, where she primarily handled labor and employment issues. From there, she went on to become an Assistant General Counsel for the American Federation of Government Employees (AFGE), AFL-CIO, the largest Federal sector labor organization representing more than 600,000 Federal and District of Columbia government employees. In her nearly twenty years with AFGE, she led precedent setting litigation and handled cases arising under the full array of laws governing Federal employment. Ms. Wagner graduated from the University of Notre Dame and received her J.D. from the George Washington University, National Law Center. She is admitted to practice law in the District of Columbia, Maryland, and Illinois as well as before various Federal courts, including the U.S. Supreme Court.

MARK A. ROBBINS
Member
May 2012 to Present

Mark A. Robbins was nominated by President Barack Obama on December 5, 2011 to serve as a Member of the Merit Systems Protection Board. He was confirmed by the U.S. Senate on April 26, 2012 and sworn in on May 16, 2012. Mr. Robbins' term expires on March 1, 2018.

At the time of his nomination, Mr. Robbins was the General Counsel of the U.S. Election Assistance Commission. In that capacity, Mr. Robbins worked to certify elections systems and maintain information on the best practices of conducting elections. He previously served as a Senior Rule of Law Advisor for the State Department in Babil Province, Iraq. Mr. Robbins also served as Executive Director of the White House Privacy and Civil Liberties Oversight Board between 2006 and 2008 and as General Counsel of the Office of Personnel Management from 2001 to 2006. He worked in private practice as a litigation attorney in Los Angeles, California between 1988 and 2000, and in the White House Office of Presidential Personnel from 1984 to 1988. Mr. Robbins earned his undergraduate degree and his law degree from George Washington University. He is a member of the California and District of Columbia bars.

MARY M. ROSE
Vice Chairman
January 2006 – November 2009
Board Member
November 2009 to March 1, 2012

Mary M. Rose was sworn in as a Board Member on December 28, 2005, following her confirmation by the Senate on December 17, 2005. She was designated by President Bush as Vice Chairman of the U.S. Merit Systems Protection Board on January 27, 2006, and served in that role until November 2009 when a new Vice Chairman was sworn in. Mrs. Rose's appointment as Board Member expired on March 1, 2011. In accordance with statute, Mrs. Rose continued to serve as a Member of the Board until March 1, 2012.

Prior to joining the Board, Mrs. Rose was appointed by President Bush to serve as Vice Chairman of the Federal Salary Council. She was Chairman of the Federal Prevailing Rate Advisory Committee where she advised the Director of the U.S. Office of Personnel Management on Federal pay, benefits, and other policy issues. Previously, Mrs. Rose served as Deputy Associate Director of the Office of Presidential Personnel at the White House. She served four years as the Elected Clerk of the Circuit Court, Anne Arundel County, Maryland. Mrs. Rose has also served as Assistant Director for Executive Administration, Office of Personnel Management; Director of Personnel, White House Personnel Office; and Deputy Undersecretary for Management at the Department of Education. Her private sector experience includes positions as a consultant with an Annapolis law firm and as a Visiting Fellow with The Heritage Foundation where she recruited, interviewed, and recommended Presidential appointments to the George W. Bush transition team. Mrs. Rose received an R.N. degree from the Bon Secours Hospital School of Nursing, and she completed the Maryland Registered Nurse Recertification Program in May 2000.

MSPB Offices and Their Functions

The agency is divided into seven headquarters offices in Washington, D.C., and eight regional and field offices located throughout the United States. The agency is currently authorized to employ 226 Full-time Equivalents (FTEs) to conduct and support its statutory duties.

The **Board Members** include the Chairman, Vice Chairman, and Board Member. The Board Members adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer of MSPB. The Office Directors report to the Chairman through the **Executive Director**.

The **Office of the Administrative Law Judge** (ALJ) adjudicates and issues initial decisions in corrective and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against ALJs, MSPB employee appeals, and other cases assigned by MSPB. The functions of this office are currently performed by ALJs at the U.S. Coast Guard, Federal Trade Commission, and Environmental Protection Agency under reimbursable interagency agreements.

The **Office of Appeals Counsel** conducts legal research and prepares proposed decisions for the Board for cases in which a party files a Petition for Review (PFR) of an initial decision issued by an

Administrative Judges (AJ) and in most other cases decided by the Board. The office prepares proposed decisions on interlocutory appeals of rulings made by AJs, makes recommendations on reopening cases on the Board's own motion, and provides research, policy memoranda, and advice to the Board on legal issues.

The **Office of the Clerk of the Board** receives and processes cases filed at MSPB headquarters, rules on certain procedural matters, and issues Board decisions and orders. The office serves as MSPB's public information center, coordinates media relations, operates MSPB's library and on-line information services, and administers the Freedom of Information Act (FOIA) and Privacy Act programs. The office also certifies official records to the courts and Federal administrative agencies, and manages MSPB's records systems, website content, and the Government in the Sunshine Act program.

The **Office of Equal Employment Opportunity** plans, implements, and evaluates MSPB's equal employment opportunity programs. It processes complaints of alleged discrimination brought by agency employees and provides advice and assistance on affirmative employment initiatives to MSPB's managers and supervisors.

The **Office of Financial and Administrative Management** administers the budget, accounting, travel, time and attendance, human resources, procurement, property management, physical security, and general services functions of MSPB. It develops and coordinates internal management programs, including review of agency internal controls. It also administers the agency's cross-servicing agreements with the U.S. Department of Agriculture (USDA), National Finance Center for payroll services, U.S. Department of the Treasury, Bureau of the Public Debt for accounting services, and USDA's Animal and Plant Health Inspection Service for human resources management services.

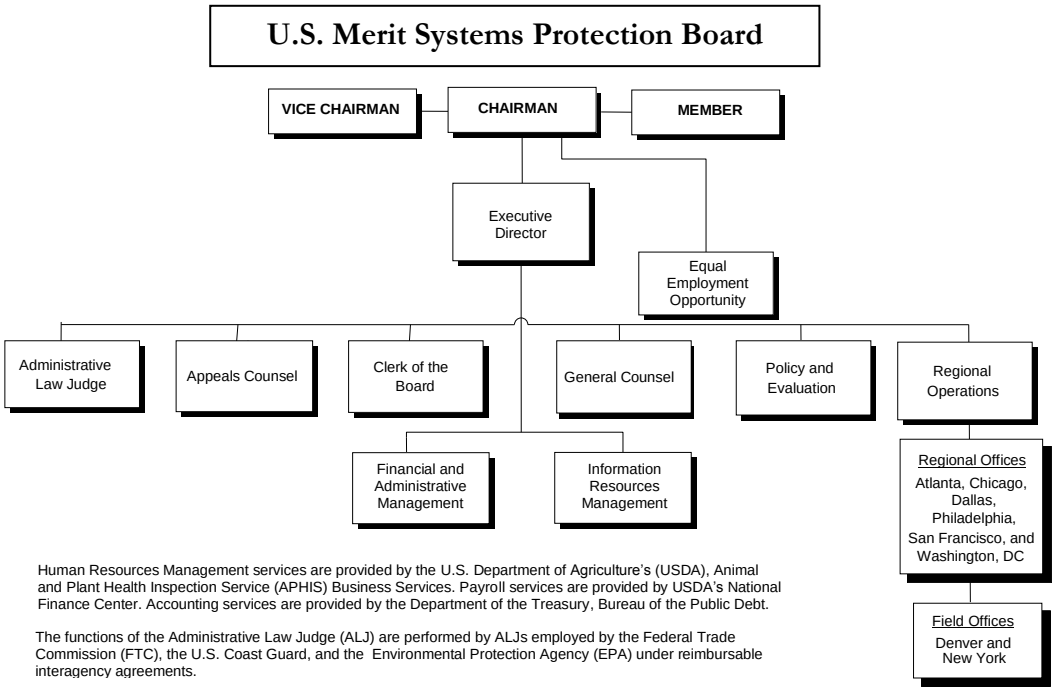
The **Office of the General Counsel**, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; prepares proposed decisions for the Board to enforce a final MSPB decision or order, in response to requests to review OPM regulations, and for other assigned cases; conducts the agency's PFR settlement program; coordinates the agency's review of OPM rules and regulations; and coordinates MSPB's legislative policy and congressional relations functions. The office drafts regulations, conducts MSPB's ethics program, performs the Inspector General function, and plans and directs audits and investigations.

The **Office of Information Resources Management** develops, implements, and maintains MSPB's automated information systems to help the agency manage its caseload efficiently and carry out its administrative and research responsibilities.

The **Office of Policy and Evaluation** carries out MSPB's statutory responsibility to conduct special studies of the civil service and other Federal merit systems. The office delivers reports of these studies to the President and the Congress and distributes them to a national audience. The office provides information and advice to Federal agencies on issues that have been the subject of MSPB studies. The office reviews and reports on the significant actions of OPM. The office also conducts special projects and program evaluations for the agency and has responsibility for preparing MSPB's strategic and performance plans and performance reports required by the Government Performance and Results Act Modernization Act of 2010 (GPRAMA).

The **Office of Regional Operations** oversees the agency's six regional and two field offices, which receive and process appeals and related cases. It also manages MSPB's Mediation Appeals Program (MAP). AJs in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair, well-reasoned, and timely initial decisions.

MSPB Organization Chart



Fiscal Year in Review

Adjudication and Enforcement

MSPB issued 7,585 decisions in FY 2012 including 6,523 initial decisions issued by the regional and field offices, and 1,050 decisions issued by the Board at headquarters. Headquarters and the regional and field offices continued to issue high quality decisions. The average processing times were within targets for initial appeals but were slower than the timeliness targets for PFRs and enforcement cases. MSPB provided a full menu of successful alternative dispute resolution options to its customers, including settlement programs in the regions, field offices, and headquarters, the Mediation Appeals Program, and the availability of AJs separately designated for settlement of a case. MSPB also continued its extensive outreach to its adjudication stakeholders including practitioner forums for agency and appellant representatives and other interested stakeholders in MSPB's regional and field office communities. MSPB continued its partnership with local law school clinics in San Francisco and Denver to improve the availability of *pro bono* representation for *pro se* appellants.

The agency continued its efforts to improve the transparency of its adjudication processes and decisions at headquarters. In early FY 2012, the Board heard oral arguments in *Latham et al v. U.S. Postal Service*, a set of cases involving restoration rights of employees suffering work-related injuries and the Board's jurisdiction over such cases. The Board requested amicus briefs in other cases and expects to continue to request amicus briefs and/or to hear oral arguments in cases that have Governmentwide impact on the Federal civil service and the merit systems. The Board continued to issue expanded explanations of its decisions in non-precedential orders on PFRs and has made these orders available on MSPB's website. This additional information improves the understanding of the Board's decisions by the parties, is lauded by the Federal Circuit Court, and is available for others to promote the understanding of our process.

In FY 2012, MSPB continued formal rulemaking in support of revising its adjudication regulations under 5 C.F.R. Sections 1200, 1201, 1203, 1208, and 1209. This is the first time these regulations have been completely reviewed and revised since MSPB's founding in 1979. A summary of the revision process and contents of the new regulations is included in a separate section of this report. This report also contains brief summaries of the most significant Board decisions issued in FY 2012 which addressed such issues as adverse actions, due process and harmful procedural error, jurisdiction, retirement, discrimination, Hatch Act, fitness for duty, whistleblower protection, compliance, performance-based actions, restoration, settlement, penalties, attorney fees, and reduction in pay. In addition, the report includes summaries of significant opinions relevant to MSPB's work issued during FY 2012 by the U.S. Court of Appeals for the Federal Circuit and by the U.S. Supreme Court.

In addition, this report contains case processing statistics for initial appeals decided by MSPB's regional and field offices, and for PFRs and other cases decided by the Board at headquarters. Case processing statistics include the general type of cases (e.g., adverse action, reduction in force, performance, CSRS retirement, FERS retirement, individual right of action, USERRA, and VEOA) for both initial appeals and PFRs. The data also include the overall disposition of the cases including the number dismissed (e.g., for lack of jurisdiction or lack of timeliness), or not dismissed. Of the initial appeals not dismissed, the data include the number settled and adjudicated on the merits. Of the initial appeals adjudicated on the merits, the data include the disposition of the action reviewed (e.g., the action was affirmed, reversed, mitigated or modified, or other). The data also include the

disposition of initial appeals and disposition of initial appeals adjudicated on the merits according to Federal agency. The data also include the disposition of the PFR (e.g., dismissed, denied, settled, granted, or denied but reopened) and the disposition of PFRs granted and denied but reopened (affirmed, reversed, remanded, mitigated, or other). The data also include the disposition of PFRs according to Federal agency.

Merit Systems Studies

MSPB completed three external reports addressing employee perceptions of violence in Federal workplaces, motivating Federal employees through job design and rewards, and stewardship of the Federal workforce, as well as the FY 2011 MSPB Annual Report. MSPB published three editions of the *Issues of Merit (IoM)* newsletter. Summaries of MSPB study reports and newsletter topics are provided later in this report.

MSPB studies continued to be referenced by policy makers and in professional literature, legislation, and the media. For example, MSPB research on whistleblower protections and the experiences of Federal employees who observe wrongdoing in the workplace was cited by the Special Counsel as informing their recommendations to Congress for legislative change and providing educational materials to its stakeholders. In addition, OPM cited MSPB research to reinforce the importance of supervisory training in recently-issued guidance to Federal agencies.[5] Interviews about several MSPB studies were conducted on Federal News Radio. MSPB recorded over 189,000 accesses to 53 MSPB reports, and almost 9,900 accesses to 16 editions of the *IoM* newsletter on its website.

The Significant Actions of the Office of Personnel Management

MSPB is responsible for providing an independent, nonpartisan review of the significant actions of OPM to ensure that these actions conform with MSPs and do not result in PPPs. MSPB reviewed OPM's human capital management policy actions, ranging from those related to recruitment and hiring, final regulations for the Pathways Programs, Presidential transition guidance, the request for reconsideration of *Conyers vs. Department of Defense*, SES performance appraisals, advancing Federal telework, phased retirement, guidance on diversity and inclusion, and extending benefits to same-sex partners. MSPB reviewed OPM's significant actions related to the delivery of benefits and services, including improving access to health insurance, USAJOBS 3.0, and reducing pending retirement claims. This year, MSPB staff met with OPM representatives about many of OPM's significant actions to clarify issues and ensure accurate understanding of OPM's actions. Summaries of these actions and their significance are included later in this report.

Outreach and Merit Systems Education

In FY 2012, MSPB staff conducted almost 150 outreach events with customers, stakeholders, and sister agencies on the merit systems, MSPs, and PPPs, MSPB's adjudication processes and decisions, and its studies' findings and recommendations. MSPB's regional and field offices conducted practitioner forums with agency representatives, appellant representatives, union representatives, and other stakeholders about MSPB procedures, case law, and other legal issues related to Federal employment law. MSPB continued to increase its efforts to educate people about the concept of merit, MSPs, and PPPs through online activities, such as the MSP of the Month and PPP of the Month, which are the most visited webpages and the most accessed documents on MSPB's website.

[5] U.S. Office of Personnel Management, Supervisory Training Fact Sheet, December 2012.

In FY 2012, MSPB had almost 260,000 visits to the MSPs, PPPs, *IoM* newsletter, case report, and training webpages, and nearly 3,800,000 hits (one or more document accessed per hit) to documents on these pages. MSPB continued its electronic outreach and communication activities through increased use of its Twitter account (@USMSPB) and recorded additional downloads of its mobile applications for the iPhone and Android. MSPB's education and outreach efforts help enhance the understanding of merit, ensure that MSPs are consistently applied throughout the Government, reduce the likelihood of PPPs, promote better management practices, and strengthen employee engagement. This in turn improves employee and organizational performance, improves service to the American people, and provides value to the taxpayer.

International Activities

During FY 2012, MSPB hosted or participated in several meetings with international representatives for the purpose of educating participants on the Federal merit systems, MSPB's organization, and its responsibilities to protect the Federal merit systems. MSPB hosted the Chairman of the Agency for Civil Service Affairs for the Republic of Kazakhstan to discuss protecting the rights of civil service employees. MSPB officials met with a delegation from the Republic of Croatia to discuss government corruption and hosted delegations from several Chinese provinces with specific interests in performance management and assessing the efficiency of civil servants. MSPB officials also met with a French judge specializing in employment law who was able to observe a hearing before an AJ in MSPB's Washington Regional Office. MSPB staff also participated in an outreach event with an Indonesian delegation interested in promoting accountability and transparency in Government agencies.

Legislative and Congressional Relations

The term of former Member Mary M. Rose expired on March 1, 2011. Pursuant to the Board's enabling statute, she continued to serve as Member until March 1, 2012 because no successor had been confirmed for the position. On December 5, 2011, President Barack Obama nominated Mark A. Robbins to serve as Member of the Board. The Senate confirmed his nomination on April 26, 2012 and he was sworn into office on May 16, 2012. Mr. Robbins' term expires on March 1, 2018.

MSPB senior and legislative staff conducted two briefings on the Board's FY 2012 budget request for congressional staff. As usual, one of the briefings was for the appropriations staff. This year, an additional briefing on the agency's budget request was conducted at the request of Senate oversight staff. The Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia conducted a hearing entitled: A Review of the Office of Special Counsel and Merit Systems Protection Board on March 20, 2012. Chairman Grundmann and Special Counsel Lerner testified at the hearing. Chairman Akaka was the only Senator on the panel. He expressed satisfaction with the performance of both agencies under their current leaders. He also expressed concern that each agency be provided with the funding resources necessary to accomplish their statutory missions.

Chairman Grundmann presented Senator Akaka with an honorary Theodore Roosevelt Award on March 20, 2012, for his "dedicated service and lasting contributions to the Federal merit systems and Federal workforce." Senator Akaka served as Chairman of the Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia. He retired from the Senate at the end of the 112th Congress.

Congress passed the Whistleblower Protection Enhancement Act (WPEA) of 2012 (Public Law 112-199), on November 13, 2012 and it was signed by the President on November 27, 2012. The WPEA contains the most significant changes to whistleblower protections in almost two decades. This legislation amends the WPA to expand the scope of protected disclosures to include disclosures made to the alleged wrongdoer, disclosures that were previously known, and disclosures made in the normal course of duties. In addition, the WPEA does not permit exclusion from coverage based on the motive for the disclosure or its timing, and the exclusion of claims based on disagreements with policy determinations was narrowed greatly. The law also protects the disclosure of "any" violation of any law, rule, or regulation, and adds § 2302(b)(9)(A)(i), (B), (C), and (D) to the covered actions over which the Board has appellate jurisdiction.

Additionally, these amendments: (1) provide whistleblower protections for all TSA employees; (2) authorize MSPB to impose disciplinary action if it finds that the protected activity was a "significant motivating factor" in the retaliatory action; (3) suspend, for 2 years, the exclusive jurisdiction of the U.S. Court of Appeals for the Federal Circuit over MSPB whistleblower cases (which permits appeals of MSPB decisions in these cases to be filed in any court of appeals of competent jurisdiction); (4) authorize MSPB to award compensatory damages if it awards corrective action in an Individual Right of Action appeal, as well as damages if it finds that an agency has conducted an investigation of an employee in retaliation for whistleblowing; and (5) require MSPB to include case processing data, including outcomes, in its annual performance reports. Except for TSA coverage, which took effect on the date the law was signed, the WPEA took effect on December 27, 2012.[6] More information about how the WPEA may impact MSPB is provided in the section on external factors that may affect MSPB's work.

The Hatch Act Modernization Act of 2012, was enacted on December 28, 2012, and takes effect on January 28, 2013. The Act broadens the scope of permissible political activities for some Federal, state and local employees. This bill permits state and local employees to run for partisan elective office unless their salary is paid entirely from Federal funding (through loans or grants). Federal employees who live in the District of Columbia may also run for local political office, and take an active role in political management and political campaigns to the same degree that residents of Maryland and Virginia who live in the immediate vicinity of the District of Columbia may engage in those activities.

The amendments to the Hatch Act also expand the range of penalties that may apply to violations of the Act by Federal employees. A Federal employee who violates the Hatch is now subject to removal, reduction in grade, debarment from Federal employment for a period not to exceed five years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.00. Under the previous statute, the penalty was removal unless the Board unanimously agreed that the violation did not warrant removal, in which case the Board was required to impose the penalty of a 30-day suspension without pay. These new penalty provisions for Federal employees apply retroactively to any violation that occurred before the effective date unless: (1) the Office of Special Counsel has presented a complaint for disciplinary action to the Merit Systems Protection Board; or (2) the Federal employee alleged to have violated the Hatch Act has entered into a signed settlement agreement with the Office of Special Counsel with respect to the alleged violation.

[6] The updated text for the 8 sections of the U.S.C. changed by the WPEA is available on the MSPB website at http://www.mspb.gov/appeals/uscode.htm.

Internal Management Activities and Challenges

In FY 2012, MSPB continued to focus on improving internal management to ensure delivery of mission and achievement of agency goals. To determine internal priorities, MSPB considered prior internal reviews, the current status of internal programs, the results of the FY 2011 Federal Employee Viewpoint Survey, and its efforts to walk-the-talk (or implement appropriate recommendations from MSPB merit system studies). In FY 2012, MSPB focused on improving overall employee engagement, the link between agency and SES performance and employee recognition, internal training and development, budget justifications, IT resources management, and safety and security.

MSPB focused on various aspects of employee engagement including communication, linking performance and employee recognition, and training and development. Communication efforts included Chairman Grundmann conducting the first ever MSPB all-hands meeting of agency employees, followed by presentations by the Executive Director and Performance Improvement Officer about the new agency strategic and performance plans with all MSPB offices. MSPB began development of new SES performance plans linked to agency plans, and will continue this effort in FY 2013. Executive Committee subcommittees for training and development and for employee recognition were established to review and make recommendations for improvements in in these areas. Subcommittees included representatives from all offices (headquarters and the regional and field offices) and employees at all levels of the agency. MSPB is currently in the process of implementing many of the recommendations made by these subcommittees. In addition, MSPB conducted a Legal Training Symposium in May 2012, which included sessions ranging from updates on MSPB legal precedent, to new MSPB regulations, and other administrative topics. MSPB University, an internal program for providing professional and personal development opportunities, provided eight courses ranging from Federal benefits, presentations from our sister agencies, stress reduction, and low-cost sources for training.

MSPB's efforts to improve budget justification resulted in retention of proportionally more resources for FY 2012 than many other agencies, although we continue to operate below the resource level needed to execute our mission as effectively and efficiently as possible. MSPB also improved its management of IT resources replacing and upgrading standard employee laptop hardware and software, moving email to the cloud, and continuing improvements in IT backup facilities. An Executive Committee subcommittee was appointed to review and make recommendations to improve safety and security. Improvements in safety and security were implemented in FY 2012, including an interim safety and security plan. Further improvements, including more safety and security training, are intended for FY 2013.

MSPB implemented its new Strategic Plan for FY 2012-2016 which included changes that more thoroughly reflect MSPB's broader role in protecting merit and preventing PPPs as intended by the Civil Service Reform Act of 1978 (CSRA). MSPB's Annual Performance Plan (APP) for FY 2012 was the first APP implemented under the new Strategic Plan. Successfully implementing these new plans will better protect merit systems, increase adherence to MSPs, and prevent or reduce PPPs which will ultimately result in better Federal management, improved Federal employee and agency performance, better service to the public, and increased value to American taxpayers. MSPB's FY 2012 program performance in relation to the FY 2012 APP will be available in the MSPB Annual Performance Report and Plan (APRP) in February 2013.

Despite the progress made in these areas, MSPB continues to struggle with internal challenges primarily related to retirement eligibility, increasing number of vacancies, limited resources, and competing priorities for existing resources. Almost one-third of MSPB employees and nearly 50% of MSPB's AJs are eligible to retire in the next two years. MSPB does not have the resources to hire in advance of these retirements in order to ensure a smooth transition and transfer critical knowledge of the adjudication process. In addition, the number of writing attorneys who review legal issues and draft decisions for the Board members to consider has decreased significantly as several highly experienced writing attorneys have taken other positions at MSPB, transferred to other agencies, or retired. There are not sufficient resources to fill all these vacancies. In addition, once hired it takes 2-3 years for an AJ or a writing attorney to become fully versed in the Board's law and procedures. The average processing time for initial decisions and PFRs is increasing. In particular, PFR processing time has been higher than targeted levels in recent years, and the inventory of PFR cases is growing. MSPB will continue to emphasize adjudication decision quality and transparency over processing speed. Given these factors, it is likely that average processing time for initial decisions and PFRs will continue to increase. Efforts to strengthen MSPB's review of OPM rules, regulations, and significant actions, improve the collection of important customer service information and conduct program evaluation is competing with fewer existing resources. Resource constraints and competing priorities may also affect MSPB's ability to conduct outreach, especially if it involves travel or extensive preparation or staff time.

There are vacancies in other Board offices and several employees holding key positions are also eligible to retire in the near future. There are not sufficient resources to fill these vacancies, nor to hire in advance of retirement in key positions. In addition, MSPB experienced significant changes in agency leadership positions. The Director of the Office of Appeals Counsel (OAC) took another position within MSPB, the Director of Financial and Administrative Management (FAM) took a position in another agency, and the Director of the Office of Policy and Evaluation (OPE) retired. These changes resulted in the loss of considerable agency expertise and knowledge impacting three of seven offices at headquarters as well as the agency as a whole. As resources permit, recruitment efforts to fill agency leadership positions and prioritize hiring of key staff are underway and will continue into FY 2013.

Efforts to strengthen MSPB's review of OPM rules, regulations, and significant actions, improve the collection of important customer service information, and conduct program evaluation is competing with fewer existing resources. Although MSPB employees report high levels of commitment to the agency's mission, resource issues are impacting employee morale. MSPB will continue to focus on strong internal management and communication in an effort to mitigate the impact of fewer resources. However, MSPB will continue to request and justify the resources it requires to conduct its mission and make clear the impact that resource constraints have on its performance.

Significant External Trends and Issues

The most significant external trends or issues affecting MSPB's ability to carry out its mission to protect the Federal merit systems include the Federal budget, increasing retirements of Federal employees, changes in law and jurisdiction, changes in employee management flexibilities, and changes in government work.

The Federal budget: Governmentwide actions to decrease Federal budgets include pay freezes, severe limitations in employee awards (for performance, special acts, quality step increases, or other purposes), and limits on within-grade increases. The freeze in Federal pay and limits on awards may

increase retirement and adversely impact employee morale and productivity. Constraints on pay and awards may also shift employees' attention to the application of performance appraisal systems and ratings, which could in turn increase performance-based appeals to MSPB. Budget reductions may also increase agency use of furloughs (involuntary temporary release from duty without pay), reductions in force (RIFs) to decrease the size of the workforce, actions taken in lieu of or of in preparation for RIFs, hiring delays or freezes, and reductions in training and development to save money. Historical trends indicate that increasing RIFs would lead to potentially large increases in the number of appeals filed with MSPB.

Freezing employee pay and possible reductions in hiring and workforce training may also have long-term impacts on MSPs such as the efficiency and effectiveness of the workforce. It is logical to consider that employees' personal financial stress may affect employee conduct, performance, or morale, but it is difficult to know specifically how those affects may manifest themselves. Reductions or long delays in hiring and/or reductions in workforce training may affect the efficiency and effectiveness of the workforce in terms of loss of expertise and workforce capacity to carry out the mission. It could take years for Federal agencies to recover from these issues. Emphasis on merit systems studies is important to continue studying the impact of these workforce changes on adherence to MSPs and avoidance of PPPs. It is also important to promote merit and educate the workforce, especially managers and leaders, about how to adhere to MSPs and to avoid PPPs when making management decisions such as those related to reducing the workforce.

Increasing retirements of Federal employees: The proportion of retirement-eligible Federal employees continues to increase. The number of Annuitants added to the Annuity Roll Processing System increased from 2010 to 2011 as the market improved. We would expect this number to increase in the next few years assuming the Thrift Savings Plan remains stable and agencies work to reduce their workforces. As retirements increase, we expect to see an increase in retirement appeals. In addition, OPM is reducing its backlog of retirement claims, increasing the number of retirement decisions that may be appealable to MSPB. Finally, the proportion of Federal Employee Retirement System (FERS) retirement claims to all retirement claims is increasing. According to OPM, FERS retirement claims are more complex than CSRS claims, thus appeals of FERS decisions filed with MSPB will likely take more time to process than CSRS claims. As the Government replaces retiring employees with relatively younger, less experienced employees, there is likely to be a decrease in the average age of the workforce. As this occurs, MSPB may see an increase in appeals as historical information indicates that less experienced employees typically have more appealable actions taken against them than do more experienced employees.

Statutory changes in Federal retirement such as the new authority that phases in the opportunity for employees in the FERS to claim service credit toward retirement for their sick leave balance, and the potential to allow full-time Federal employees to phase their retirements or work in part-time status, may alter retirement rates and thus may impact retirement appeals. If Congress changes the retirement program, such as increasing the required level of employee contributions to their annuity, or changing the calculations for the annuity (such as basing the annuity on the average high five years instead of the average high three years) for current retirement-eligible employees, the Government could experience a surge in retirements, followed by a surge in retirement appeals to MSPB.

Changes in law and jurisdiction: The most recent changes in law and jurisdiction involve the Postal Service's National Reassessment Project (NRP), the WPEA, and the Hatch Act Modernization Act of 2012. While most Postal Service non-preference eligible employees do not

have the right to appeal an adverse action to MSPB, restoration appeals from the USPS cover a much broader category of employees. On December 13, 2011, the Board heard oral arguments in *Latham et al v. U.S. Postal Service*, a set of over 70 cases involving restoration rights of Postal Service employees suffering work-related injuries and the Board's jurisdiction over such cases. In these cases, the Board affirmed the Postal Service's obligation, based on its own rules, to restore employees who have been injured on the job to available work that is medically suitable, and the Board affirmed that MSPB has jurisdiction over appeals involving this issue. To the degree that more injured Postal Service employees are denied restoration, MSPB expects to see an increasing number of restoration-to-duty appeals from Postal Service employees. Depending on how these cases are interpreted, it could increase the number of restoration-to-duty appeals to the Board from other Federal agencies.

The modifications and supplemental coverage contained in the WPEA both extend coverage to matters not previously within the jurisdiction of MSPB and expand MSPB's adjudicatory authority in such cases. The WPEA is likely to: increase the number of individual right of action (IRA) and otherwise appealable action whistleblower appeals; reduce the number of dismissals through the expanded definition of a protected disclosure; increase the complexity of whistleblower appeals in terms of content and review of MSPB decisions by multiple courts; increase the number of full hearings on such cases; increase the information and data collected and reported for such cases; increase travel to represent MSPB at various Circuit Courts; and increase addendum claims for attorney's fees, damages or monetary awards, and enforcement of MSPB decisions. These changes will have dramatic effects on MSPB and will require the commitment of greater resources to enable MSPB to implement Congress's mandate. MSPB has established working groups comprised of representatives from all offices to facilitate smooth implementation of the WPEA.

The Hatch Act Modernization Act of 2012 broadens the scope of permissible political activities for some Federal, state and local employees. Under the new law, Federal employees who live in the District of Columbia may run for local political office, and take an active role in political management and political campaigns to the same degree that residents of Maryland and Virginia who live in the immediate vicinity of the District of Columbia may engage in those activities. The amendments also expand the range of penalties that may apply to violations of the Act by Federal employees. Under certain conditions, these new penalty provisions for Federal employees apply retroactively to any violation that occurred before the effective date. It is unclear at this time how changes in the Hatch Act may affect MSPB's work or workload.

Changes in law, appeal rights, and appellate jurisdiction also increase the importance of MSPB's statutory responsibility to promote merit and educate employees, supervisors, managers, and leaders on the merit systems, MSPs, PPPs, and MSPB appellate procedures, processes, and case law. Education on these issues, promoting merit, and sharing important information about appeals procedures will improve workforce management over time and should reduce the cost of appeals to agencies, appellants, and the Government.

Changes in employee management flexibilities: Changes in management flexibilities could involve expanding flexibilities or returning to traditional management authorities. For example, the National Defense Authorization Act (NDAA) for FY 2010 (Public Law 111-84) required Department of Defense (DoD) to transfer all employees and positions from National Security Personnel System (NSPS) back to traditional title 5 authorities by January 1, 2012. In January 2012, the Board released its decision in *Arrington v. Department of the Navy*, in which it found that the transfer of the appellant from the NSPS resulted in her being improperly downgraded to GS-13,

when prior to her participation in the NSPS she had been a GS-14 employee, and that under the facts of the case, this constituted an appealable reduction in grade. This ruling may increase MSPB's workload if other transferees—roughly 226,000—appeal to MSPB making similar allegations.

Management flexibilities may also be directed through administrative actions such as Presidential Executive Orders. For example, President Obama issued Executive Order 13562 in December 2010, establishing the Pathways Programs. The Pathways Programs creates a set of excepted service appointing authorities tailored to ease and encourage recruitment, hiring, development, and retention of students and recent graduates. The Pathways Programs formally acknowledges a long-standing interest of Federal agencies and Federal managers—the ability to hire high-quality college graduates into professional and administrative occupations. It is unknown what impact the Pathways Programs will have on hiring and management or if it will succeed in its goals. More information about the Pathways Programs is contained in the Review of OPM Significant Actions section of this report. MSPB plans to closely follow the evolution and implementation of these programs.

Changes in Federal management flexibilities also emphasize the need for MSPB to continue its study of Federal merit systems and human capital management practices to ensure the flexibilities are implemented and operated in accordance with MSPs and are free from PPPs. Flexibilities and other changes in human resource management policies issued through OPM regulation make it imperative that MSPB strengthen its ability to exercise its statutory authority to review OPM regulations. Reviewing OPM regulations can save the Government in direct costs such as those associated with transferring employees in and out of more flexible systems that are later terminated, and in indirect costs associated with negative employee perceptions of the new system and possible reductions in morale. Finally, changes in management flexibilities also increase the importance of MSPB's role in promoting and educating employees and the public about the merit system, MSPs, and PPPs.

Changes in Government Work: Government work has continued to shift from administrative processing to knowledge-based work. Federal human resources management systems, many designed in the 1940s and 1950s, do not have the flexibility needed to manage a knowledge-based workforce effectively. Various issues, including recruitment and hiring, performance management and pay, and training and development need to be addressed to improve and maintain a diverse workforce of highly engaged and motivated employees who can perform agency missions and serve the public. At the same time, MSPs and fair treatment must be ensured, along with freedom from discrimination and from the occurrence of PPPs. Improvements are also needed in the selection and training of supervisors and managers who must use the existing management systems to manage a modern workforce and achieve results for the public. These changes emphasize the need for a strong merit systems studies function and increased focus on promoting and educating employees and the public about the merit systems, MSPs, and PPPs.

This page intentionally left blank.

Summary of Revisions to MSPB Adjudication Regulations

In FY 2011, Chairman Grundmann's initiated a top-to-bottom review of MSPB's adjudicatory regulations, the first such review since MSPB originally published regulations in 1979. The Chairman's initiative began with an invitation to all MSPB employees to submit their ideas for updating and improving the regulations. A working group composed of employees from all parts of the agency began meeting in March 2011 to consider the employees' recommendations. The Board considered their proposals, and the Board-approved proposals were distributed in October 2011 to numerous external stakeholders for comment and MSPB staff met with stakeholders in March of 2012. The internal working group reconvened for a second set of meetings to evaluate stakeholder comments and recommend to the Board changes to be included in the notice of proposed rulemaking. After revision and approval by the Board, the notice of proposed rulemaking was published in the Federal Register on June 7, 2012.[7] Twenty-five individuals and organizations submitted written comments. The internal working group considered these comments during a third set of meetings and made additional recommendations to the Board. After Board approval, the notice of final rulemaking was published in the Federal Register on October 12, 2012.[8]

The revised regulations became effective on November 13, 2012 and are posted on MSPB's website.[9] The regulations have been formatted to make them easier to read online. In addition, live links to provisions of the United States Code and U.S. Code of Federal Regulations have been added to make nearly all of the references accessible. The website also contains a version of the regulations optimized for printing.[10] Numerous other documents relating to the regulation review initiative are available on the website, including a 3-column table that shows all of the changes made to the regulations and the reasons for the changes, as well as all comments received to the notice of proposed rulemaking.[11]

Some of the more significant changes to MSPB's adjudication regulations include the following:

Elections in Whistleblower Appeals and Related Notice Requirements: Under longstanding Board case law, an individual who claimed that an action that is directly appealable to the Board had been taken in retaliation for the individual's whistleblowing disclosures, and who sought corrective action from the Special Counsel before filing an appeal with the Board, retained all the rights associated with an otherwise appealable action in the Board appeal. In an adverse action, for example, the agency must prove its charges, nexus, and the reasonableness of the penalty by a preponderance of the evidence, and the appellant is free to assert any affirmative defense he or she might have in addition to retaliation for whistleblowing, including harmful procedural error and discrimination under Title VII or the Rehabilitation Act. This can be contrasted to the much more limited rights in an individual right of action (IRA) appeal, where the only issue before the Board is whether the agency took one or more covered personnel actions against the appellant in retaliation for making protected whistleblowing disclosures. The Board's case law failed to consider an amendment to 5 U.S.C. § 7121 in 1994 which added a paragraph (g) that provides that an individual who is subjected to retaliation for protected whistleblowing "may elect not more than one" of 3 remedies: (A) an appeal to the Board under 5 U.S.C. § 7701; (B) a negotiated grievance under

[7] 77 Fed. Reg. 33663.
[8] 77 Fed. Reg. 62349.
[9] http://www.mspb.gov/appeals/appeals.htm.
[10] http://www.mspb.gov/appeals/appealsprintregs.htm.
[11] http://www.mspb.gov/regulatoryreview/index.htm.

§ 7121(d); or (C) corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC (§ 1214), which can be followed by an IRA appeal filed with the Board (§ 1221). The Board's revision to 5 C.F.R. § 1209.2 overturns previous case law and implements the election requirements of section 7121(g). Section 1201.21 was revised to require agencies to give notice to employees who have been subjected to an appealable action of their options in this regard. Section 1201.21 was also revised to require agencies to give employees notice of their similar options when they make a claim of unlawful discrimination in connection with an otherwise appealable action.

Case Suspensions and Dismissals Without Prejudice: Section 1201.28 was revised to allow for two suspension periods of up to 30 days each, instead of the current single suspension period, and to eliminate restrictions on when a request must be filed. Section 1201.29 was added to describe and codify the circumstances in which an appeal may be dismissed without prejudice and the procedures that govern such cases following dismissal.

Discovery: The initial disclosure requirement of section 1201.73, which required certain disclosures by both parties at the start of a Board proceeding without a discovery request, was eliminated. The Board determined this requirement was unnecessary and led to unproductive motion practice. Unlike rules governing proceedings in Federal courts, on which the initial disclosure requirement was based, an existing MSPB regulation (1201.25) requires agencies to produce all documents contained in their record of the action appealed.

Petitions for Review: Revised section 1201.114 institutes length limitations for pleadings to the full Board on review of initial decisions. It also provides for a reply to the response to a petition for review. Such pleadings are typically allowed by appellate courts and administrative tribunals, subject to the limitation that they be limited to the factual and legal issues raised by the other party. Section 1201.114 clarifies that no pleadings other than the ones specifically defined in the regulation will be allowed without seeking and receiving leave of the Clerk of the Board. Section 1201.115 was substantially rewritten so as to conform the regulation to the broader criteria by which the Board has actually reviewed such petitions, including situations where the Board has denied a petition but "reopened" the appeal "on its own motion" to address a petitioner's arguments or vacate, modify, or reverse an initial decision. The revised regulation is intended to grant a petition or cross petition for review whenever the petitioner shows that: (1) the case was incorrectly decided based on the existing record; (2) new and material evidence indicates that the outcome should be different than in the initial decision; or (3) the petitioner did not get a full and fair adjudication process.

Reopening Final Board Decisions: Section 1201.118 was revised to clarify that "reopening" only applies to and is reserved for instances in which the Board has already issued a final order or the initial decision has become the Board's final decision by operation of law.

Review of Arbitration Decisions: New section 1201.155 revises previous practice in two significant ways. First, the regulation now provides that, when the negotiated grievance procedure permits allegations of discrimination, the Board will review only those claims of discrimination that were raised in the negotiated grievance procedure. Second, the regulation provides that, when the Board determines that the existing record is insufficient to make findings of fact and conclusions of law on discrimination claims, it may develop the record by ordering the parties to submit additional evidence or by forwarding the request for review to a judge to conduct a hearing. The Board determined that remand to the arbitrator would not be practical or feasible in such cases.

Petitions for Enforcement: The revised regulation changes the nature of an administrative judge's decision in a compliance proceeding from a "recommendation" to a regular initial decision which becomes the Board's final decision if a petition for review is not filed or is denied. The goal is to ensure, to the extent feasible, that all relevant evidence is produced during the regional office proceeding, and that the initial decision actually resolves all contested issues. To the extent that an agency found to be in noncompliance decides to take the compliance actions identified in the initial decision, the proposed regulation increases the period for providing evidence of compliance from 15 days to 30 days. To the extent that this party believes that the initial decision erroneously found noncompliance, it may petition the Board to reverse or modify that finding. New paragraph (d) codifies existing case law regarding the different burdens of proof that apply in enforcement actions depending on whether the Board is adjudicating a petition to enforce relief ordered by the Board (typically status quo ante relief when the Board has not sustained an agency action), or a petition to enforce a settlement agreement that a party is alleging that the other party breached.

One proposed revision to the regulations (section 1201.56), setting forth rules governing an appellant's burden to establish jurisdiction over an appeal before MSPB, was withdrawn in the notice of final rulemaking. A revision is necessary to resolve a conflict between the current regulation, which provides without exception that appellants have the burden of proving jurisdiction by preponderant evidence, and Board case law that provides for establishing some jurisdictional elements by making nonfrivolous allegations. Concerns about the correctness of the proposed solution to this conflict were raised, both by external commenters and within MSPB. The proposed requirement that an appellant must establish by preponderant evidence that he or she was subjected to an appealable action and that he or she is a person entitled to appeal such an action does not appear to be controversial, but there is concern about other jurisdictional elements, particularly elements that are also merits issues. Given the importance of setting forth a principled framework for determining whether a particular matter is jurisdictional, and the appropriate burden for establishing that matter, the Board decided to withdraw the proposed regulation and to reexamine this issue in 2013.

This page intentionally left blank.

Significant Board Decisions and Court Opinions Issued in FY 2012

MSPB issued a number of noteworthy decisions in FY 2012, several of which are summarized below. As a service to our stakeholders, we have also provided brief summaries of selected significant opinions issued by the U.S. Court of Appeals for the Federal Circuit and the U.S. Supreme Court. This section also includes Significant Board decisions and Court opinions issued in early FY 2013.

Significant Board Decisions Fiscal Year 2012

Jurisdiction

Arrington v. Department of the Navy, 2012 MSPB 6, 117 M.S.P.R. 301: This was the lead case among several involving conversions to and from the now-defunct National Security Personnel System (NSPS). The appellant was converted from a GS-14 position into a series of pay-banded positions within NSPS. Following the abolishment of the NSPS in October 2009, she was converted to a GS-13 position with no loss in pay. She filed an appeal, alleging that she was demoted from the GS-14 level to the GS-13 level. The judge dismissed her appeal for lack of jurisdiction, finding that the appellant did not suffer a reduction in grade or pay, and that the Board lacked authority to review the decision to classify her position as a GS-13. The Board reversed, finding that the appellant had suffered an appealable reduction in grade. In reaching that conclusion, the Board noted that the appellant was not reduced in grade while serving within NSPS and that the appellant's conversion from her NSPS position to a GS-13 position did not, standing alone, constitute a reduction in grade, because neither chapter 75 nor OPM's implementing regulations indicates how a reduction in grade, i.e., "a level of classification under a personnel system," is to be determined where there is movement with no reduction in pay between different classification systems. However, the Board found that the crucial fact in this case was that the appellant initially occupied a position at one level of classification within the General Schedule, GS-14, and was later placed involuntarily at a lower level, GS-13, within the same classification system. That sequence of events, the Board found, constituted an appealable reduction in grade from GS-14 to GS-13, even though the action was not recorded on any Standard Form 50. Because the agency did not provide the appellant an opportunity to make a response in connection with the reduction in grade, the Board reversed the action on due process grounds and remanded the case for adjudication of the appellant's discrimination claim.

Burton v. Department of the Air Force, 2012 MSPB 73, 118 M.S.P.R. 210: To establish Board jurisdiction over a probationary termination appeal based on a claim of marital status discrimination under 5 C.F.R. § 315.908, an appellant must meet the two-part test set forth in *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006), an en banc decision in which the Federal Circuit abrogated its earlier decision in *Stokes v. Federal Aviation Administration*, 761 F.2d 682 (Fed. Cir. 1985). An appellant must first make a nonfrivolous allegation of jurisdiction, which entitles her to a hearing, where she must prove the basis for jurisdiction, i.e., marital status discrimination, by a preponderance of the evidence. If she fails to do so, the Board lacks jurisdiction over the appeal.

Compliance

Stasiuk v. Department of the Army, 2012 MSPB 48, 118 M.S.P.R. 1: An agency does not necessarily satisfy its obligation to implement a settlement term regarding reinstatement by technically and

facially reinstating the employee to the position in question. Every settlement agreement contains an implicit requirement that the parties fulfill their respective contractual obligations in good faith. Even if an agreement does not specifically prohibit retaliation or harassment, an agency's post-settlement harassment and retaliation against an appellant may constitute bad faith in implementing a reinstatement term and thereby establish agency noncompliance with the settlement agreement.

Attorney Fees

Guy v. Department of the Army, 2012 MSPB 54, 118 M.S.P.R. 45: As the prevailing party in an individual right of action (IRA) appeal, the appellant was entitled to attorney fees for time spent in connection with the preceding complaint before the Office of Special Counsel (OSC) because exhaustion of administrative remedies before OSC is a jurisdictional prerequisite for filing an IRA appeal and that work contributed significantly to the appellant's success before the Board. If a party has achieved only "partial or limited success," the tribunal awarding fees may make an equitable adjustment as to what reduction is appropriate by identifying specific hours that should be eliminated or, in the alternative, reducing the overall award by a percentage to account for the limited degree of success. The former method is preferred where it is practicable to segregate the hours devoted to related but unsuccessful claims.

Due Process/Harmful Procedural Error—Security Clearances

McGriff v. Department of the Navy, 2012 MSPB 62, 118 M.S.P.R. 89; *Buelna v. Department of Homeland Security*, 2012 MSPB 63, 118 M.S.P.R. 115; *Gargiulo v. Department of Homeland Security*, 2012 MSPB 64, 118 M.S.P.R. 137; *Gaitan v. Department of Homeland Security*, 2012 MSPB 71, 118 M.S.P.R. 180: At issue in these cases was whether the agencies violated the appellants' constitutional right to due process when the agencies indefinitely suspended them based upon the suspension of their access to classified information. The Board held that when a suspension is based on restriction of the employee's security access, the agency is required to provide the employee a meaningful opportunity to respond to the reasons for the suspension by ensuring that, either in the advance notice of that action or in the earlier access determination, the employee has been notified of the cause that led to the access determination. To determine whether an agency has violated an employee's constitutional right to due process in indefinitely suspending the employee pending a security clearance determination, the Board applies the balancing test set forth in *Gilbert v. Homar*, 520 U.S. 924 (1997), weighing the following three factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest. Due process requires that the appellant receive a meaningful opportunity to respond to someone with authority to change the outcome of the security clearance determination in either the security clearance proceeding or the adverse action proceeding. In *Buelna*, the Board held that these principles also apply in cases involving Transportation Security Administration employees.

Ingram v. Department of Defense, 2012 MSPB 66, 118 M.S.P.R. 149: At issue in this case was whether the agency denied the appellant due process in effecting her demotion based upon the loss of her eligibility for access to classified information and occupancy of a sensitive position. The agency's notice of proposed demotion did not state the reasons for the loss of eligibility; however, during a prior eligibility proceeding the agency informed the appellant of the reasons it was examining whether to end her eligibility and afforded the appellant the opportunity to respond to those reasons and to appeal its decision. The Board found that, because the appellant received the required notice of the specific charges against her in the eligibility proceeding, and the eligibility determination

formed the basis of her demotion, the agency did not deny the appellant minimum due process in effecting her demotion.

Doe v. Department of Justice, 2012 MSPB 95, 118 M.S.P.R. 434: Because individuals with a Special-Sensitive Level 4 designation have ready access to a security clearance should the need to secure one on short notice become necessary, the requirement that an employee maintain eligibility to hold a Special-Sensitive Level 4 position as a condition of employment is functionally equivalent to a security clearance requirement. Consequently, the restrictions on Board review of security clearance determinations imposed by the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988) apply in an appeal of an adverse action based on the withdrawal of eligibility to hold a Special-Sensitive Level 4 position. In *Romero v. Department of Defense*, 527 F.3d 1324 (Fed. Cir. 2008), the court held that *Egan* does not preclude the Board from reviewing whether the agency complied with its own regulations and procedures in revoking a security clearance. Under the agency's rules, the appellant was entitled to review by the agency's Access Review Committee of the decision to withdraw his eligibility for access to classified information. In *Romero*, the court directed the Board to review whether the agency's failure to comply with its own regulations and procedures in revoking a security clearance constituted harmful error. Here, however, the Board does not have any record upon which to conduct the required review because the agency failed to afford the appellant any access to its internal process. Accordingly, the Board remanded the appeal to the agency to apply its internal procedures for reviewing a decision to withdraw an employee's eligibility for access to classified information.

Due Process/Harmful Procedural Error—Ex Parte Information

Wilson v. Department of Homeland Security, 2012 MSPB 56, 118 M.S.P.R. 62: In this case, the agency's deciding official concluded that the appellant had committed misconduct that was not identified in either the agency's notice of proposed removal or the decision notice, and he considered this misconduct as an aggravating factor weighing in favor of removal. Pursuant to the Federal Circuit's decision in *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279-80 (Fed. Cir. 2011), if an ex parte communication with a deciding official introduces "new and material information" to the deciding official such that the communication "is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances," then a due process violation will be found, the adverse action must be reversed, and the individual is entitled to a new constitutionally correct procedure. Even if a due process violation has not occurred, the Board will determine whether the agency has committed harmful error within the meaning of 5 U.S.C. § 7701(c)(2)(A). This analysis applies not only to whether a charge of misconduct can be sustained but also to whether the ex parte communication affected the selection of the penalty to be imposed. The Board vacated the initial decision affirming the appellant's removal and remanded the case for further adjudication, including a determination as to whether the agency deprived the appellant of minimum due process of law.

Howard v. Department of the Air Force, 2012 MSPB 61, 118 M.S.P.R. 106: This case was before the Board on remand from the Federal Circuit for further proceedings in light of *Ward v U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011). The deciding official had considered the appellant's allegedly poor performance as an aggravating factor weighing in favor of removal, even though the agency's notice of proposed removal did not mention the appellant's poor performance as an aggravating factor. On remand, the Board applied the analysis set forth in *Ward*, 634 F.3d at 1279-80, for determining whether a deciding official's consideration of ex parte information constitutes a due process violation. The Board found that the ex parte information at issue was not cumulative

because it concerned information regarding alleged performance deficiencies of which the appellant was not given notice and an opportunity to respond in the removal action. The Board further found that, in a situation like this, where the deciding official has admitted that the ex parte information influenced his penalty determination, the information in question is clearly material. The Board found that the deciding official's consideration of this aggravating factor was "so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances." Therefore, the Board found, the agency violated the appellant's due process rights. Accordingly, it ordered the agency to cancel the appellant's removal and restore him to his position.

Jenkins v. Environmental Protection Agency, 2012 MSPB 70, 118 M.S.P.R. 161: In determining the appropriate penalty, the agency's deciding official relied on guidance in the table of penalties relating to a charge that was not referenced in the notice of proposed removal. Applying the analysis set forth in *Ward*, 634 F.3d at 1279-80, for determining whether a deciding official's consideration of ex parte information constitutes a denial of due process, the Board found that the agency's reliance on the recommended penalty for a charge other than those set forth in the notice of proposed removal cannot fairly be deemed cumulative or immaterial to the deciding official's decision. Therefore, the agency violated the appellant's due process rights by denying her notice of the specific information considered and denying her an opportunity to respond. Accordingly, the Board reversed the appellant's removal.

Whistleblower Protection

Tullis v. Department of the Navy, 2012 MSPB 3, 117 M.S.P.R.236: The appellant, a Financial Management Analyst, filed an Individual Right of Action (IRA) appeal alleging that the agency changed his job duties and working conditions in retaliation for questioning the travel practices of his command as being in violation of the agency's travel regulations, and for cooperating with an Inspector General (IG) investigation regarding his command's travel program by responding to the IG's questions. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant's disclosures to management were not protected because they were made to the alleged wrongdoers, and that the appellant's statements to the IG were not protected because he did not make the statements on his own initiative and his responses to the IG's inquiries were part of his normal job duties. On petition for review, the Board found that the appellant made nonfrivolous allegations of protected disclosures to the IG. The Board first noted that the Whistleblower Protection Act (WPA) refers to "any disclosure," without making a distinction based on who initiated the conversation that led to the disclosures. Thus, the fact that the appellant did not come forward of his own initiative to the IG is not dispositive, or even relevant, in determining whether his disclosures were protected. The Board further found that the disclosures to the IG were not part of the appellant's normal job duties because, although the appellant was obligated to cooperate with the IG, he did not occupy a position with any particular investigatory responsibilities, and the fact that the information he disclosed was closely related to his day-to-day responsibilities did not remove the disclosure of that information from protection.

Cassidy v. Department of Justice, 2012 MSPB 60, 118 M.S.P.R. 74: The Board found that the appellant established jurisdiction over his individual right of action appeal and remanded the appeal for adjudication on the merits. The appellant, a Deputy Chief Counsel with the Immigration of Customs Enforcement, alleged that his nonselection for two Immigration Judge positions with the agency was in retaliation for his complaints to the Assistant Chief Immigration Judge concerning the conduct of another immigration judge. In reversing the administrative judge's finding that the appellant failed to

make a nonfrivolous allegation that he made a protected disclosure, the Board found that one of the appellant's five alleged disclosures – that the immigration judge's conduct and unnecessary delays violated the due process rights of detained aliens scheduled for their initial appearances before him– was protected in that the appellant reasonably believed that he was disclosing a violation of law, rule, or regulation. The Board also found that the appellant made a nonfrivolous allegation that his disclosures were a contributing factor in his nonselection for the two positions because there was evidence that, although the judge to whom the appellant made the disclosures did not make the decision regarding the appellant's nonselection, he influenced the panelists who made the decision regarding both positions.

Farrington v. Department of Transportation, 2012 MSPB 85, 118 M.S.P.R. 331: At issue in this individual right of action appeal was whether the appellant's disclosures to her fourth-level supervisor concerning alleged inadequate funding for surveillance of an airline's flight attendant training programs and deficiencies in that training were protected under the WPA. The administrative judge determined that the disclosures were not protected under the Federal Circuit's decision in *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001), finding that the disclosures were made as part of her normal duties through normal channels. The Board reversed this ruling, stating that the term "normal channels" should be given its commonly understood meaning, i.e., the employee conveyed duty-related information to a recipient, who in the course of his or her duties, customarily receives the same type of information from the employee and from other employees at the same or similar level in the organization as the employee. Here, the appellant did not normally report safety concerns to the fourth-level supervisor in question; in fact, she had not previously communicated with this official at all. The Board concluded that the disclosure was made outside of normal channels and was therefore protected.

Discrimination

Southerland v. Department of Defense, 2011 MSPB 92, 117 M.S.P.R. 56: The Board reopened and vacated its August 25, 2011 decision in this case and substituted a new decision in order to clarify the proper analysis of the appellant's disability discrimination claim in light of the recently revised EEOC regulations, issued May 24, 2011, implementing the ADA Amendments Act of 2008 (ADAAA). In particular, the Board noted that the administrative judge did not have the benefit of the new regulations, which provide that, where an individual is not claiming failure to accommodate, it is generally unnecessary to proceed under the "actual disability" or "record of" prongs, and the evaluation of coverage can be made solely under the "regarded as" prong of the definition of disability. *See* 29 C.F.R. § 1630.2(g)(3). Because the appellant in this case had not asserted that the agency failed to accommodate him, but instead asserted that the agency removed him on the basis of his impairment, the Board found that the administrative judge's analysis should have focused on whether the appellant meets the "regarded as" definition set forth at 29 C.F.R. § 1630.2(g)(1)(iii) and further explained at § 1630.2(*l*).

The Board also held that a mixed motive analysis is not applicable under the ADAAA. Nothing in the plain language of the statute resolves the question and the Board found that despite the change of language from "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual" to "[n]o covered entity shall discriminate against a qualified individual on the basis of disability," 42 U.S.C. § 12112(a), the terms mean the same thing and do not require a mixed motive analysis. Further, nothing in the legislative history indicates a Congressional intent to authorize a mixed-motive approach. The Board found persuasive the rationale of the court in *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010), which

reached that conclusion. Thus, a "but for" test applies and the burden of persuasion does not shift to the agency to show that it would have taken the action regardless of disability, even if the appellant produces some evidence that disability was one motivating factor in the adverse employment action.

Fitness for Duty Examination

Doe v. Pension Benefit Guaranty Corporation, 2012 MSPB 42, 117 M.S.P.R. 579: The agency directed the appellant to undergo a psychiatric fitness for duty (FFD) examination based on "unusual and inappropriate behavior" the appellant had exhibited in recent months. Based on the results of the FFD examination, the agency placed the appellant on enforced leave status. That suspension ended when the appellant submitted a medical report from her doctor indicating that she was able to work without restriction. However, the agency found that the report did not contain sufficient information to determine whether she was able to work and directed her to undergo a follow-up FFD examination, which ultimately resulted in a second suspension action. The appellant filed appeals of both suspensions. In both cases, the administrative judge reversed the action on the grounds that OPM's regulations did not authorize the agency to order a FFD examination, but found that that the appellant had failed to prove her claim of disability discrimination. On petition for review, the Board joined the appeals and granted the appellant's request to proceed under a pseudonym, on the grounds that the sensitive medical information in the record stemmed from the improper FFD examinations. The Board found that the agency lacked authority to order an FFD examination because, under 5 C.F.R. § 339.301, an agency may order a medical examination only in three limited circumstances, none of which applies in this case. The Board further found that the EEOC regulations implementing the ADA did not provide the agency independent authority to order an examination prohibited under OPM regulations, and the collective bargaining agreement did not provide the agency authority that would be lacking under part 339. With respect to the appellant's claims of disability discrimination, the Board found that remand was necessary because the administrative judge failed to determine whether the appellant was "regarded as" disabled under the ADAAA and the EEOC regulations implementing the ADAAA. The Board also rejected the appellant's argument that the agency's actions constituted direct evidence of discrimination.

Adverse Action Charges

Bair v. Department of Defense, 2012 MSPB 17, 117 M.S.P.R. 374: The appellant sustained a work-related injury in January 2009 and did not return to work. In May 2010, the agency removed her on a charge of excessive absences. On appeal, the appellant contended that the agency could not discipline a disabled employee who was receiving workers' compensation benefits. The administrative judge sustained the removal, and the Board affirmed the initial decision. In doing so, the Board reaffirmed the principle that an agency need not indefinitely carry an employee receiving workers' compensation benefits on its employment rolls. The Board recognized that, under 5 U.S.C. § 8151(b)(1), a compensably injured employee who fully recovers within one year of the date of commencement of compensation has an unconditional right to return to his former or an equivalent position, and that removing such an individual based on leave use during that statutory one-year period would be inappropriate. However, the Board further found that Congress did not provide job security to compensably injured employees who, like the appellant, do not fully recover within the statutory one-year time frame.

Performance Based Actions

Muff v. Department of Commerce, 2012 MSPB 5, 117 M.S.P.R. 291: In October 2009, the appellant was placed on a performance improvement plan (PIP) based on the agency's determination that her performance in one critical element was unacceptable. After she successfully completed the PIP, the agency removed her for unacceptable performance on the same critical element in May 2010. On appeal, the administrative judge concluded that the appellant's performance for only one month was an insufficient basis on which to remove her because the agency failed to consider her performance for any other month after her successful completion of the PIP. On review, the Board considered the question of whether an agency may take an action within 1 year of the advance notice of a PIP based on 1 month of unacceptable performance without consideration of other months of successful performance during and after the PIP. The Board answered in the negative, noting that, while the appellant's performance was measured monthly, it was evaluated on an annual basis. The Board distinguished the case from another in which the employee's performance fell below the acceptable level only 2 months after completion of the PIP and she continued to fail for 2 successive months. In this case, by contrast, the appellant performed successfully during the 4-month PIP and for 6 months thereafter, and her performance was unacceptable for only 1 month.

Retirement

Henderson v. Office of Personnel Management, 2012 MSPB 11, 117 M.S.P.R. 313: The Board reversed an initial decision that affirmed OPM's denial of the appellant's application for disability retirement benefits under CSRS. In doing so, the Board overruled *Bynum v. Office of Personnel Management*, 89 M.S.P.R. 1 (2001), and its progeny insofar as these decisions indicated that there is a "general rule" that medical evidence must show that the appellant's medical condition affects specific job duties and requirements, and that, under an "exception" to the rule, the Board may link the medical evidence to the job duties where such evidence unambiguously and without contradiction indicates that the appellant cannot perform the duties or meet the requirements of her position. The Board noted that, under 5 U.S.C. § 8337(a), an applicant for disability retirement under CSRS must be "unable, because of disease or injury, to render useful and efficient service in the employee's position." The regulation at 5 C.F.R. § 831.1203(a)(2) sets out two ways to satisfy the statutory requirement: (1) by showing that the medical condition caused a deficiency in performance, attendance, or conduct; or (2) by showing that the medical condition is incompatible with useful and efficient service or retention in the position. Regardless of the particular method of establishing an inability to render useful and efficient service, the burden of proof is preponderant evidence, i.e., more likely true than not. Thus, to require medical evidence that is unambiguous and without contradiction imposes a much higher burden of proof than is authorized by law or regulation. The Board will consider all pertinent evidence in determining an appellant's entitlement to disability retirement, and nothing in the law mandates that a single provider tie all of this evidence together. The ultimate question, based on all relevant evidence, is whether the employee's medical impairments preclude her from rendering useful and efficient service in her position, and this question must be answered in the affirmative if the totality of the evidence makes that conclusion more likely to be true than not true.

Restoration

Latham v. U.S. Postal Service, 2012 MSPB 20, 117 M.S.P.R. 400: The appellants in this consolidated case had been assigned modified limited duty assignments following their partial recovery from work-related injuries. Pursuant to its National Reassessment Process, the agency discontinued the

appellants' limited duty assignments, informing them that there were no operationally necessary tasks available for them within their medical restrictions. The appellants filed appeals under 5 C.F.R. § 353.304(c), alleging that the agency had acted arbitrarily and capriciously in denying them restoration. The Board observed that, while this regulation does not require an agency to assign a partially recovered employee limited duties that do not comprise the essential functions of a complete and separate position, the agency's Employee and Labor Relations Manual (ELM) may require such assignments. The issue to be decided, therefore, was whether denial of restoration would be "arbitrary and capricious" within the meaning of § 353.304(c) based solely on a violation of an agency's internal rules. After receiving briefs on the issue from the parties and several amici, the Board granted the agency's request for oral argument. In addition, the Board requested and obtained an advisory opinion from OPM. Following oral argument, the Board issued a 2-1 decision finding that the Board's jurisdiction under 5 C.F.R. § 353.304(c) may encompass a claim that an agency's violation of its internal rules resulted in an arbitrary and capricious denial of restoration. The Board first ruled that, under the Federal Circuit's recent decision in *Bledsoe v. Merit Systems Protection Board*, 659 F.3d 1097 (Fed. Cir. 2011), the appellants must prove the jurisdictional elements, including the "arbitrary and capricious" standard, by preponderant evidence, and overruled Board precedent to the contrary. With regard to the "arbitrary and capricious" standard, the Board noted that OPM's regulation at § 353.301(d) provides that agencies must "make every effort" to restore employees who have partially recovered from a compensable injury and must, "at a minimum," treat the employees substantially the same as individuals under the Rehabilitation Act. In its advisory opinion, OPM stated that, if the agency established a rule that provided partially recovered employees with greater restoration rights than the "minimum" required by regulation, then it was required to meticulously follow that rule, and that to do otherwise would be arbitrary and capricious within the meaning of § 353.304(c). The Board found that OPM's interpretation of its own regulation is controlling, as it is consistent with the plain language of the regulation and not clearly erroneous. In her dissenting opinion, then-Member Rose expressed her view that, contrary to OPM's advisory opinion, OPM's regulations could not reasonably be interpreted as granting the Board jurisdiction to enforce the substantive restoration entitlements conferred by the ELM or other internal agency directives.

Settlement

Cooper v. Department of Veterans Affairs, 2012 MSPB 23, 117 M.S.P.R. 611: At issue in this case was the validity of a last chance settlement agreement in which the agency agreed to hold a removal action in abeyance for 24 months, subject to the appellant's agreement to accept a 60-day suspension for the sustained charges and to be subject to random testing for alcohol. The agreement further provided that, if the testing revealed the appellant to be under the influence of alcohol, the removal action would be effected based on the sustained charges and the appellant would waive his Board appeal rights. The appellant argued that the settlement agreement was invalid because it allowed for both a suspension and a removal based on the same misconduct. The Board found that a last-chance agreement that waives both the right of appeal and the right not to be disciplined twice for the same offense may be enforced if it meets other requirements for a valid settlement agreement. In such a case, the appellant may conclude that the certain benefit of escaping removal and accepting a lesser penalty exceeds the speculative benefit that he might prevail in the removal appeal, and the incorporation of some discipline into the agreement makes it more likely that the agency will consider entering into the agreement because the employee will not escape all punishment for the charged offense.

Zumwalt v. Department of Veterans Affairs, 2012 MSPB 115 (2012): The appellant had been suspended for 3 days for improperly accessing a state database, but the parties settled his IRA appeal with a clean record agreement. An agent in the agency's OIG later investigated the appellant's use of the database and informed state officials about it. The Board's majority found a violation and remanded the appeal to allow the appellant to choose whether to enforce or rescind the settlement. The majority held that a clean record provision must be construed to give the appellant the benefit of his bargain, and here, the agent's disclosure breached the agreement, regardless of the fact that the agent was not in the same chain of command as the appellant and the officials who signed the agreement. The limited exception, discussed in *Fomby-Denson v. Department of the Army*, 247 F.3d 1366 (Fed. Cir. 2001), is where public policy requires the disclosure of information concerning criminal activity, but the majority found that does not apply here because although the appellant could have been criminally prosecuted, the agent was not making a criminal referral when he disclosed the information. In dissent, Member Robbins argued that the agency was not in breach because under the Inspector General Act of 1978, an IG is not subject to supervision by anyone but the agency head or the officer next in rank below the agency head and cannot be prohibited from initiating any investigation. Given an IG's independence, he would have found that IG personnel cannot be bound by an agreement between an employee and non-IG personnel.

Reduction in Pay

Smith v. Department of the Army, 2012 MSPB 24, 117 M.S.P.R. 628: The Board affirmed the initial decision that reversed the agency's decision to terminate the appellant's Law Enforcement Availability Pay (LEAP). Title 5 U.S.C. § 5545(a) requires that each criminal investigator receiving availability pay and the appropriate supervisory officer make an annual certification that the investigator has met, and is expected to meet, the requirement that the annual average of unscheduled duty hours worked is in excess of each regular work day by at least 2 hours per day. The statute is ambiguous as to when certification can be denied, but OPM has promulgated a regulation, 5 C.F.R. § 550.184(d), which identifies only two circumstances, neither present in this case, in which an agency may deny certification: (1) when an investigator has failed to perform unscheduled duty as assigned or reported; or (2) when he is unable to perform scheduled duty for an extended period due to physical or health reasons. The Board deferred to OPM's regulation, finding that OPM's regulation was not only a reasonable interpretation of the statute, but consistent with the statute's legislative history.

Hatch Act

Special Counsel v. Greiner, 2011 MSPB 98, 117 M.S.P.R. 117: Respondent Greiner ran successfully as a Republican candidate for Utah State Senate while serving as Chief of Police for the Ogden City Police Department (OPD). During the period of his candidacy, the OPD received funding via several grants from the Department of Justice. The Special Counsel charged Greiner with violating the Hatch Act, 5 U.S.C. § 1502, which prohibits a state or local employee whose principal employment is in connection with an activity financed in whole or in part by Federal loans or grants from running as a candidate for partisan political office. The administrative law judge found that Greiner had violated the Act and that the violation warranted his removal. In a 2-1 decision, the Board affirmed the initial decision, finding that Greiner's connection with Federal funding was not de minimis, and that he was therefore covered under § 1502. The majority further found that the violation warranted his removal. In her dissent, Vice Chairman Wagner argued that Greiner's involvement with the Department of Justice grants was de minimis and that even if he had violated

the Hatch Act, removal was unwarranted in light of his employment record and the respondents' good faith efforts to bring him into compliance.

Veterans' Issues

Willingham v. Department of the Navy, 2012 MSPB 53 (2012): The Board found that the appellant made non-frivolous allegations that a Non-Appropriated Fund Instrumentality (NAFI), the Marine Corps Community Services at Camp Lejeune, NC, is an "agency" for purposes of VEOA. Although VEOA does not define the term "agency" and its legislative history sheds no light on the subject, Congress used the word unqualified by the term "executive," so it is not clear that the 5 U.S.C. § 105 definition applies under section 3330a. Further, when VEOA jurisdiction has been excluded, Congress generally does so by specific exemption. Remedial statutes must be construed liberally and in light of their purpose, but here the Board did not need to decide whether all NAFIs are subject to its VEOA jurisdiction. Instead it found that this NAFI operates as a component of the Marine Corps and so comes within the purview of VEOA, and that DoD administers DoD-wide "policies, procedures, programs, and guidance" for the selection of NAFI employees, so that given the extent to which it is integrated into the DoD civilian personnel system, it should be considered covered by VEOA.

Significant Opinions Issued by the U.S. Court of Appeals for the Federal Circuit

Jurisdiction

Roy v. Merit Systems Protection Board, 672 F.3d 1378 (Fed. Cir. 2011) (No. 2011-3107) : The Federal Circuit held that, in order to be an employee entitled to appeal to the Board under 5 U.S.C. § 7511(a)(1)(C)(ii), the individual must have served continuously for at least 2 years in the same or similar permanent positions immediately prior to the removal date. The court concluded that Ms. Roy did not meet that statutory definition of "employee" because she had served for less than 2 years in a permanent position at the time of her removal. The court rejected Ms. Roy's argument that she could satisfy the current continuous service requirement by tacking two periods of service in the same or similar permanent positions even though they were separated by a period of temporary appointment. The court therefore affirmed the Board's dismissal of Ms. Roy's appeal for lack of jurisdiction.

Diggs v. Department of Housing & Urban Development, 670 F.3d 1353 (Fed. Cir. 2011) (No. 2010-3193): The Board sustained the appellant's removal, finding that she failed to prove her affirmative defense of retaliation for prior equal employment opportunity (EEO) activity. On appeal, the Federal Circuit considered the question of whether the appellant's allegation of retaliation was covered under the Federal sector provision of Title VII, which would render her appeal a mixed case over which the court lacks jurisdiction. The court concluded that affirmative defenses of reprisal for prior EEO activity are assertions of discrimination under Title VII and within the meaning of 5 U.S.C. § 7702. Accordingly, the court dismissed the appeal for lack of jurisdiction because it presented a mixed case which it lacked the authority to review.

Bledsoe v. Merit Systems Protection Board, 659 F.3d 1097 (Fed. Cir. 2011) (No. 2011-3054): In affirming the Board's decision that dismissed the appellant's restoration appeal for lack of jurisdiction, the court followed *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (2006) (en banc), in holding that the Board's regulation at 5 C.F.R. § 1201.56(a)(2) required the appellant to prove jurisdiction by a preponderance of the evidence, independent of whether the facts relevant to deciding the merits of the appeal overlap with the facts relevant to deciding jurisdiction. The

court further held that, in order to establish jurisdiction under 5 C.F.R. § 353.304(c), an appellant must prove the following elements by preponderant evidence: (1) absence due to a compensable injury; (2) sufficient recovery from the injury to return to duty on a part time basis or in a less physically demanding position; (3) agency denial of a request for restoration; and (4) denial of restoration rendered arbitrary and capricious by the agency.

Wilder v. Merit Systems Protection Board, 675 F.3d 1319 (Fed. Cir. 2012) (No. 2011-3105): At issue in this case was whether Wilder, whose employment was terminated during his one-year probationary period, could combine his prior military service with his civilian service, to meet the definition of "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii), i.e., an individual who has completed one year of current continuous service under other than a temporary appointment limited to 1 year or less. The court held that term "current continuous service" is limited to "Federal civilian employment." The court found that although the statute was ambiguous, OPM had issued a regulation interpreting the requirement as being limited to "Federal civilian employment" (5 C.F.R. § 752.402) and OPM's interpretation is entitled to *Chevron* deference.

Berry v. Conyers and Northover/Merit Systems Protection Board, 692 F.3d 1223 (Fed. Cir. 2012) (No. 2011-3207): The Federal Circuit originally held that *Department of the Navy v. Egan*, 484 U.S. 518 (1988), which prohibits the Board from merits review of agency adverse actions based on the denial, revocation, and suspension of a security clearance, also limits Board review of determinations involving an employee's eligibility to occupy a sensitive position, regardless of whether the position requires access to classified information. The court reversed the decisions of the Board. The court stated that the Board erred by conflating "classified information" with "national security information" and stated that *Egan*'s "core focus" was on the latter. The court did not define "national security information," but by way of example stated that the term is broad enough to cover knowledge of "commissary stock levels of a particular unclassified item – sunglasses, for example, with shatterproof lenses, or rehydration products – [which] might well hint at deployment orders to a particular region for an identifiable unit." The court opined that "it is naïve to suppose that employees without direct access to already classified information cannot affect national security." The court concluded by stating that "[i]n our society, it has been accepted that genuine and legitimate doubt is to be resolved in favor of national security." In a dissenting opinion, Judge Dyk stated that the majority's decision effectively nullifies provisions of the Civil Service Reform Act, is not supported by any executive order authorizing agencies to limit Board review of their decisions, and is inconsistent with *Egan* and its progeny. MSPB and the employees have filed petitions for rehearing en banc. On January 24, 2013, the court granted MSPB's petition for rehearing en banc, vacated its previous decision, and ordered further briefing (No. 2011-3207).

Adams v. Department of Defense, 688 F.3d 1330 (Fed. Cir. 2012) (No. 2011-3124): In this case involving a termination based on revocation of the petitioner's security clearance, the Federal Circuit held that while the Board could not hear the merits of the termination, it could review the denial of the petitioner's request for voluntary early retirement. The court affirmed the Board's ruling as to the security clearance procedures and reversed the Board as to its authority to review the denial of the petitioner's retirement request. The Federal Circuit found that, under *Department of the Navy v. Egan*, 484 U.S. 518, 529-31 (1988), the Board's review of an agency's denial or revocation of a security clearance is limited to determining whether the agency provided minimal due process protection. The court noted, however, that the limited appeal of agency security clearance-based actions does not remove Federal employees from all other employment rights and benefits. The court stated that no statute or policy removes Board review when a retirement relates to revocation

of a security clearance. The court remanded for a determination as to whether the petitioner must first appeal his claim to OPM.

Penalty

Norris v. Securities and Exchange Commission, 675 F.3d 1349 (Fed. Cir. 2012) (No. 2011-3129): The Federal Circuit held that the deciding official had not improperly relied on ex parte information because the evidence demonstrated that although she was aware of that information at the time of her decision, mere knowledge was not enough to create a due process problem. The court further stated that the deciding official's testimony showed that she had not relied on the ex parte information in reaching her decision on the charges and the proper penalty. In addition, the court held that when new evidence in mitigation of the penalty is presented to the Board (or the arbitrator), the evidence must be considered in determining whether the agency's imposed penalty was reasonable.

Whistleblower Protections

Whitmore v. Department of Labor, 680 F.3d 1353 (Fed. Cir. 2012) (No. 2011-3084): In determining whether an agency has met its burden of proving by clear and convincing evidence that it would have taken the same personnel action in the absence of a protected disclosure, the Board must consider all of the pertinent evidence in the record, i.e., not only the evidence that supports the conclusion reached, but also evidence that fairly detracts from that conclusion. Under *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), the Board must weigh 3 factors in determining whether an agency has met its burden via clear and convincing evidence: (1) the strength of the agency's evidence in support of its personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers. Because evidence of alleged bias and impropriety pervading the investigation of Whitmore's alleged misconduct was clearly pertinent to the first two *Carr* factors, the administrative judge erred in excluding the testimony of the investigator, Morgan, and his interviewees. The administrative judge also erred by excluding the testimony of a whistleblower previously removed from his position and investigated by Morgan because that is relevant to the third *Carr* factor. The court also held that when a whistleblower makes highly critical accusations of the agency's conduct, an agency official merely being outside that whistleblower's chain of command, not directly involved in alleged retaliatory actions, and not personally named in the whistleblower's disclosures, it is insufficient to remove the possibility of a retaliatory motive or retaliatory influence on the whistleblower's treatment. The court found overly narrow the Board's view that, for employees to be "similarly situated for purposes of *Carr* factor three," all relevant aspects of the appellant's employment situation must be "nearly identical" to the comparative employees. The court held that differences in kinds and degrees of conduct between otherwise similarly situated persons within an agency should be considered in weighing this factor. The court also held that the agency must produce all reasonably pertinent evidence relating to *Carr* factor three to the extent such evidence exists. The absence of any evidence concerning this factor may cause the agency to fail to prove its case overall.

Timeliness

Rocha v. Merit Systems Protection Board & Department of State, 688 F.3d 1307 (Fed. Cir. 2012) (No. 2011-3107): Rocha's claim that he did not receive the initial decision does not constitute good cause for his untimely petition for review where the record shows that the decision was sent to the email

address he provided to the Board when he filed his appeal. As a registered e-filer, Rocha consented to accept all documents issued by the Board in electronic form and he was required by regulation to monitor his case online to insure that he received all case-related documents.

Restoration to Duty

Gallo v. Department of Transportation, 689 F.3d 1294 (Fed. Cir. 2012) (No. 2011-3094): In this restoration case, the Federal Circuit held that the Board erred by interpreting the statutory language to require that an employee physically leave the Federal government upon a compensable injury. The court reversed the Board's decision and remanded for further proceedings. The court found that the language of 5 U.S.C. § 8151(a) stating that "the entire time during which the employee was receiving compensation under [the Federal Employees' Compensation Act ('FECA')] shall be credited" indicates that it is not the separation from the Federal government, but rather the entitlement to compensation under FECA, that is the deciding factor in determining eligibility under § 8151(a). The court concluded that Congress intended § 8151(a) to encompass situations in which an employee resumes her former position or equivalent after having been forced to leave it due to a compensable injury, but who remained otherwise employed by the Federal government during the interim period while receiving workers' compensation benefits. The court held that Ms. Gallo directly qualified for rights and benefits under § 8151(a) because she received compensation under FECA during the entire period of her "separation." The court remanded to the Board for a determination as to Ms. Gallo's rights and benefits based on her length of service.

Veterans' Rights

Jarrard v. Department of Justice, 669 F.3d. 1320 (Fed. Cir. 2012) (No. 2011-3050): The appellant, a preference eligible veteran, applied for attorney positions at the Social Security Administration and Department of Justice, and both agencies selected other applicants, at least one of whom was a non-preference eligible. The Board denied his requests for corrective action under VEOA, rejecting the appellant's argument that 5 U.S.C. § 3320 required the agencies to follow the passover provisions of 5 U.S.C. § 3318 in excepted service hiring. The court affirmed, finding that OPM is barred by statute and regulation from imposing a rating or other examination system on the hiring of attorneys in the executive branch, and that the bar against examinations and ratings makes it not administratively feasible to apply the passover provisions of section 3318 to attorney hiring.

Lazaro v. Department of Veterans Affairs, 666 F.3d 1316 (Fed. Cir. 2012) (No. 2011-3190): Following his nonselection for an IT Specialist position, the appellant filed a request for corrective action under VEOA, contending that the agency violated his veterans' preference rights in finding that he did not meet the specialized experience requirement for the position. Specifically, he argued that the agency failed to comply with 5 C.F.R. § 302.302(d), which provides that, where experience is a factor in determining qualification for a position, a preference eligible is to be credited for all valuable experience gained "in religious, civic, welfare, service, and organizational activities, regardless of whether pay was received therefor." The administrative judge and the Board declined to consider whether the agency complied with § 302.302(d), on the grounds that the Board lacked jurisdiction to address the merits of the nonselection. The Federal Circuit vacated and remanded, finding that § 302.302(d) is a regulation that clearly relates to veterans' preference and that the Board has jurisdiction to determine whether the agency properly afforded the appellant the right to compete for the position and to determine, in accordance with § 302.302(d), whether he was qualified for the position.

Attorney Fees

Ward v. United States Postal Service, 672 F.3d 1294 (Fed. Cir. March 12, 2012) (No. 2010-3021): In this attorney fees matter, the Federal Circuit held that a prevailing party may recover fees under the Equal Access to Justice Act ("EAJA") following a remand from a Federal court to an administrative agency if the remand was due to administrative error. The court distinguished remands to administrative agencies from remands within the Federal court system. Further, the court clarified that remands not rooted in agency error do not result in prevailing party status. Here, however, the court held that Mr. Ward qualified as a prevailing party under EAJA because administrative errors resulted in his remand to MSPB. The court therefore found that Mr. Ward was entitled to recover attorney fees incurred during his Federal Circuit appeal.

Significant Opinions Issued by the U.S. Supreme Court

Constitutional Claims

Elgin v. Department of the Treasury, 132 S.Ct. 2126 (U.S. 2012): The Civil Service Reform Act "provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a Federal statute is unconstitutional." Even if the Board did not have the authority to consider the constitutionality of a Federal statute, the Court of Appeals for the Federal Circuit has such authority and MSPB can develop the necessary factual record for such determinations.

Jurisdiction—Mixed Cases

Kloeckner v. Solis, Department of Labor (Dec. 10, 2012) (No. 11-184): At issue in this case was the proper avenue of Court review available to an individual who has appealed a "mixed case" to MSPB and the Board has dismissed the appeal on procedural grounds rather than the merits. A mixed case is one in which a Federal agency has taken an action that is directly appealable to the Board and the individual alleges that the agency action was based on prohibited discrimination. The Supreme Court ruled that Federal district court is the proper venue for review of a mixed case, regardless of whether the Board decided the discrimination claim on the merits or on procedural grounds.

Case Processing Statistics

Summary of Cases Decided by MSPB

Table 1: FY 2012 Summary of Cases Decided by MSPB

Cases Decided in MSPB Regional and Field Offices	
Appeals	5,881
Addendum Cases[1]	546
Stay Requests[2]	96
TOTAL Cases Decided in RO/FOs	**6,523**
Cases Decided by Administrative Law Judges (ALJs) – Original Jurisdiction[3]	**12**
Appellate Jurisdiction:	
Petitions for Review (PFRs) – Appeals	833
Petitions for Review (PFRs) – Addendum Cases	104
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	0
Reopenings[4]	37
Court Remands	6
Compliance Referrals	42
EEOC Non-concurrence Cases	1
Arbitration Cases	8
Subtotal – Appellate Jurisdiction	**1,031**
Original Jurisdiction[5]	19
Interlocutory Appeals	0
TOTAL Cases Decided by the Board	**1,050**
TOTAL Decisions (Board, ALJs, RO/FOs)	**7,585**

[1] Includes 104 requests for attorney fees, 140 Board remand cases, 278 petitions for enforcement, 8 Court remand cases, 11 requests for compensatory damages (discrimination cases only), 2 requests for consequential damages, and 3 requests for liquidated damages.
[2] Includes 77 stay requests in whistleblower cases and 19 in non-whistleblower cases.
[3] Initial Decisions issued by ALJ. Case type breakdown: 6 actions against ALJs, 2 actions against a member of the SES, 5 Hatch Act cases, and 1 corrective action brought against an agency.
[4] Includes 34 cases reopened by the Board on its own motion and 3 cases where OPM requested reconsideration.
[5] Final Board decisions. Case type breakdown: 11 OSC stay requests, 2 PFRs in Hatch Act cases, 2 PFRs in actions against an ALJ, and 4 requests for regulation review.

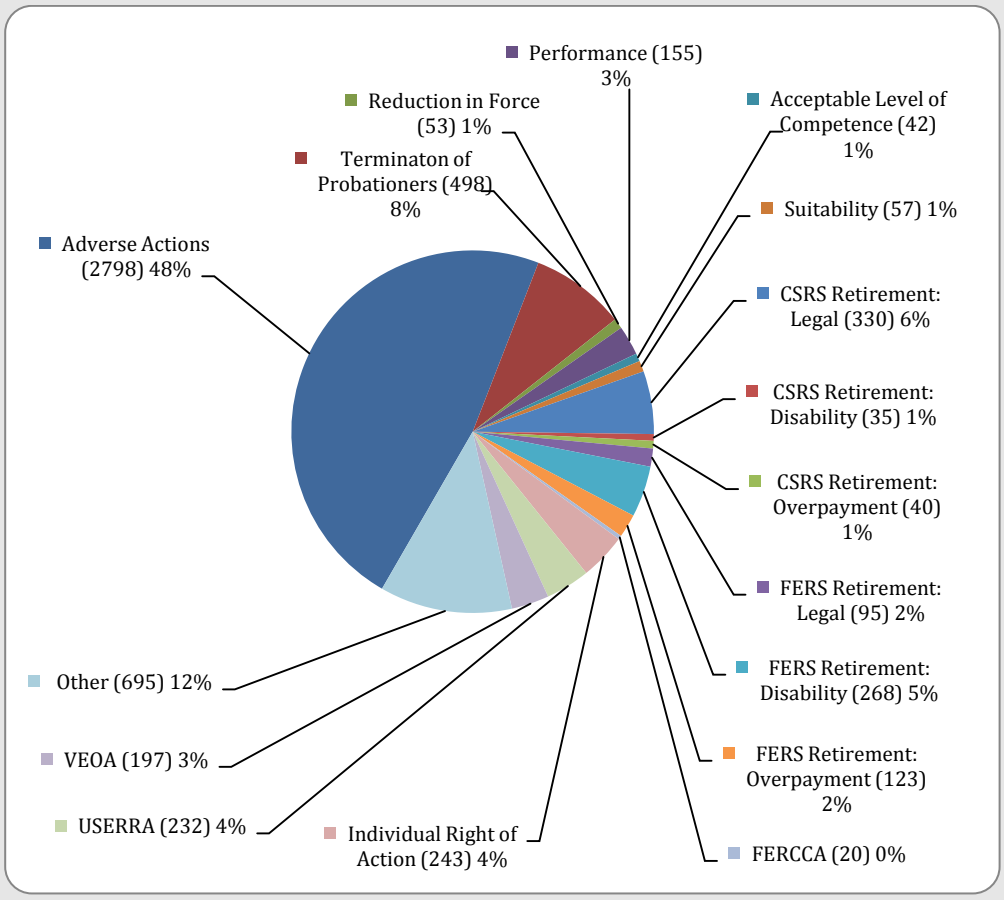
Summary of Cases Processed in the Regional and Field Offices

Table 2: Disposition of Appeals Decided in the Regional and Field Offices, by Type of Case

	Decided	Dismissed[1]		Not Dismissed[1]		Settled[2]		Adjudicated[2]	
Type of Case	**#**	**#**	**%**	**#**	**%**	**#**	**%**	**#**	**%**
Adverse Action by Agency	2798	1401	50.07	1397	49.93	974	67.72	423	30.28
Termination of Probationers	498	452	90.76	46	9.24	42	91.30	4	8.70
Reduction in Force	53	28	52.83	25	47.17	10	40.00	15	60.00
Performance	155	46	29.68	109	70.32	81	74.31	28	25.69
Acceptable Level of Competence (WIGI)	42	28	66.67	14	33.33	9	64.29	5	35.71
Suitability	57	23	40.35	34	59.65	21	61.76	13	38.24
CSRS Retirement: Legal	330	191	57.88	139	42.12	8	5.76	131	94.24
CSRS Retirement: Disability	35	23	65.71	12	34.29	1	8.33	11	91.67
CSRS Retirement: Overpayment	40	23	57.50	17	42.50	13	76.47	4	23.53
FERS Retirement: Legal	95	57	60.00	38	40.00	1	2.63	37	97.37
FERS Retirement: Disability	268	210	78.36	58	21.64	2	3.45	56	96.55
FERS Retirement: Overpayment	123	45	36.59	78	63.41	58	74.36	20	25.64
FERCCA	20	13	65.00	7	35.00	2	28.57	5	71.43
Individual Right of Action	243	170	69.96	73	30.04	33	45.21	40	54.79
USERRA	232	80	34.48	152	65.52	125	82.24	27	17.76
VEOA	197	121	61.42	76	38.58	12	15.78	64	84.21
Other[3]	695	630	90.65	65	9.35	53	81.54	12	18.46
Total	**5881**	**3541**	**60.21**	**2340**	**39.79**	**1445**	**61.75**	**895**	**38.25**

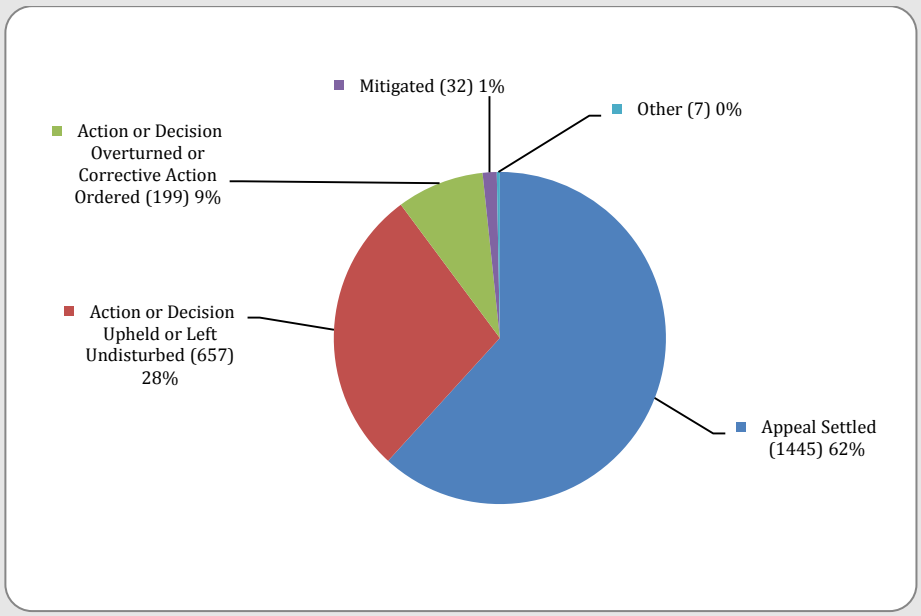
[1] Percent Dismissed and Not Dismissed are of the number Decided.
[2] Percent Settled and Adjudicated are of the number Not Dismissed.
[3] "Other" appeals include Restoration of Duty (184), Miscellaneous (452) and additional types such as Reemployment Priority, Employment Practices, and others.

Figure 1: Type of Appeals Decided in the Regional and Field Offices



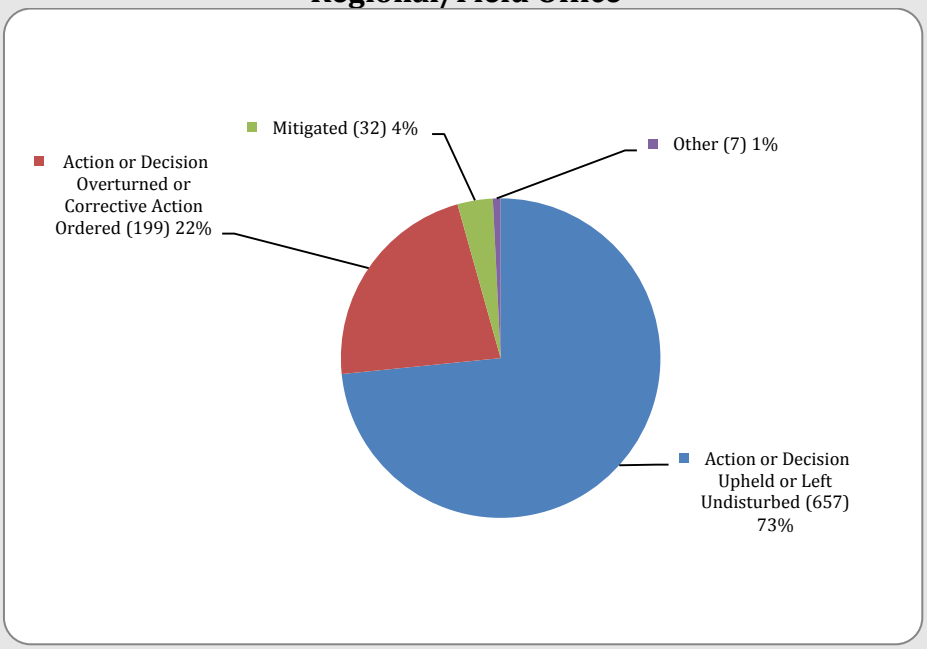
Total Number of Appeals: 5,881

Figure 2: Dispositions: Appeals Not Dismissed by Regional and Field Offices



Total Number of Appeals that were Not Dismissed: 2,340

Figure 3: Dispositions: Appeals Not Dismissed or Settled by Regional/Field Office



Based on 895 appeals adjudicated on the merits

Table 3: Disposition of Initial Appeals by Agency

	Decided	Dismissed[1]		Not Dismissed[1]		Settled[2]		Adjudicated[2]	
	#	#	%	#	%	#	%	#	%
Office of Personnel Management[3]	922	565	61.3	357	38.7	103	28.9	254	71.1
United States Postal Service	874	590	67.5	284	32.5	203	71.5	81	28.5
Department of Veterans Affairs	857	505	58.9	352	41.1	240	68.2	112	31.8
Department of the Army	614	340	55.4	274	44.6	189	69	85	31
Department of the Navy	359	200	55.7	159	44.3	110	69.2	49	30.8
Department of Homeland Security	352	208	59.1	144	40.9	86	59.7	58	40.3
Department of the Air Force	339	173	51	166	49	129	77.7	37	22.3
Department of Defense	275	168	61.1	107	38.9	67	62.6	40	37.4
Department of Treasury	215	137	63.7	78	36.3	56	71.8	22	28.2
Department of Justice	151	89	58.9	62	41.1	32	51.6	30	48.4
Department of Agriculture	138	83	60.1	55	39.9	30	54.5	25	45.5
Department of Interior	136	86	63.2	50	36.8	38	76	12	24
Department of Health and Human Services	102	61	59.8	41	40.2	28	68.3	13	31.7
Department of Transportation	75	41	54.7	34	45.3	25	73.5	9	26.5
Social Security Administration	72	43	59.7	29	40.3	16	55.2	13	44.8
Department of Commerce	69	45	65.2	24	34.8	15	62.5	9	37.5
Department of Labor	62	43	69.4	19	30.6	6	31.6	13	68.4
Department of Energy	37	25	67.6	12	32.4	6	50	6	50
Department of State	29	21	72.4	8	27.6	4	50	4	50
Department of Housing and Urban Development	26	17	65.4	9	34.6	5	55.6	4	44.4
General Services Administration	23	13	56.5	10	43.5	8	80	2	20
Environmental Protection Agency	16	7	43.8	9	56.3	4	44.4	5	55.6
Small Business Administration	15	13	86.7	2	13.3	1	50	1	50

Table 3: Disposition of Initial Appeals by Agency

	Decided	Dismissed[1]		Not Dismissed[1]		Settled[2]		Adjudicated[2]	
	#	#	%	#	%	#	%	#	%
Federal Deposit Insurance Corporation	14	10	71.4	4	28.6	2	50	2	50
Smithsonian Institution	13	6	46.2	7	53.8	6	85.7	1	14.3
Government Printing Office	9	5	55.6	4	44.4	2	50	2	50
Agency for International Development	8	6	75	2	25	0	0	2	100
Department of Education	8	4	50	4	50	4	100	0	0
International Boundary and Water Commission	8	6	75	2	25	2	100	0	0
National Aeronautics and Space Administration	8	3	37.5	5	62.5	3	60	2	40
American Battle Monuments Commission	4	1	25	3	75	2	66.7	1	33.3
Armed Forces Retirement Home	4	2	50	2	50	2	100	0	0
Court Services and Offender Supervision	4	2	50	2	50	2	100	0	0
Railroad Retirement Board	4	0	0	4	100	4	100	0	0
Selective Service System	4	2	50	2	50	2	100	0	0
Equal Employment Opportunity Commission	3	2	66.7	1	33.3	1	100	0	0
Federal Emergency Management Agency	3	2	66.7	1	33.3	0	0	1	100
Tennessee Valley Authority	3	3	100	0	0	0	0	0	0
Broadcasting of Governors	2	1	50	1	50	1	100	0	0
Federal Labor Relations Authority	2	0	0	2	100	2	100	0	0
National Labor Relations Board	2	0	0	2	100	2	100	0	0
National Science Foundation	2	1	50	1	50	1	100	0	0
Office of Government Ethics	2	1	50	1	50	1	100	0	0

Table 3: Disposition of Initial Appeals by Agency

	Decided	Dismissed[1]		Not Dismissed[1]		Settled[2]		Adjudicated[2]	
	#	#	%	#	%	#	%	#	%
African Development Foundation	1	0	0	1	100	1	100	0	0
CIA	1	1	100	0	0	0	0	0	0
Commission on Civil Rights	1	1	100	0	0	0	0	0	0
Federal Communications Commission	1	1	100	0	0	0	0	0	0
Federal Housing Finance Agency	1	1	100	0	0	0	0	0	0
Federal Maritime Commission	1	0	0	1	100	1	100	0	0
Federal Retirement Thrift Investment BOA	1	0	0	1	100	1	100	0	0
Federal Trade Commission	1	1	100	0	0	0	0	0	0
Government of the District of Columbia	1	1	100	0	0	0	0	0	0
Judicial Branch	1	1	100	0	0	0	0	0	0
Merit Systems Protection Board	1	1	100	0	0	0	0	0	0
National Credit Union Administration	1	0	0	1	100	1	100	0	0
Office of Special Counsel	1	1	100	0	0	0	0	0	0
Other	1	1	100	0	0	0	0	0	0
Pension Benefit Guaranty Corporation	1	1	100	0	0	0	0	0	0
Securities and Exchange Commission	1	0	0	1	100	1	100	0	0
TOTAL	**5881**	**3541**	**60.2**	**2340**	**39.8**	**1445**	**61.8**	**895**	**38.2**

[1] Percentages in Columns Dismissed and Not Dismissed are of Decided.
[2] Percentages in Columns Settled and Adjudicated are of Not Dismissed.
[3] Most appeals in which OPM is the agency are retirement cases involving decision made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

Table 4: Disposition of Initial Appeals Adjudicated on the Merits by Agency

	Adjudicated[1]	Affirmed		Reversed		Mitigated Modified		Other	
	#	#	%	#	%	#	%	#	%
Office of Personnel Management[2]	254	183	72	64	25.2	1	.4	6	2.4
United States Postal Service	81	56	69.1	18	22.2	7	8.6	0	.0
Department of Veterans Affairs	112	86	76.8	19	17	6	5.4	1	.9
Department of the Army	85	60	70.6	23	27.1	2	2.4	0	0
Department of the Navy	49	32	65.3	15	30.6	2	4.1	0	0
Department of Homeland Security	58	45	77.6	9	15.5	4	6.9	0	0
Department of the Air Force	37	23	62.2	14	37.8	0	.0	0	0
Department of Defense	40	28	70	11	27.5	1	2.5	0	0
Department of the Treasury	22	20	90.9	1	4.5	1	4.5	0	0
Department of Justice	30	23	76.7	6	20	1	3.3	0	0
Department of Agriculture	25	15	60	9	36	1	4.0	0	0
Department of the Interior	12	9	75	2	16.7	1	8.3	0	0
Department of Health and Human Services	13	8	61.5	3	23.1	2	15.4	0	0
Department of Transportation	9	9	100	0	0	0	.0	0	0
Social Security Administration	13	9	69.2	3	23.1	1	7.7	0	0
Department of Commerce	9	8	88.9	0	0	1	11.1	0	0
Department of Labor	13	13	100	0	0	0	0	0	0
Department of Energy	6	5	83.3	1	16.7	0	0	0	0
Department of State	4	4	100	0	0	0	0	0	0
Department of Housing and Urban Development	4	4	100	0	0	0	0	0	0
General Services Administration	2	2	100	0	0	0	0	0	0
Environmental Protection Agency	5	5	100	0	0	0	0	0	0
Small Business Administration	1	0	0	0	0	1	100.0	0	0
Federal Deposit Insurance Corporation	2	2	100	0	0	0	0	0	0
Smithsonian Institution	1	1	100	0	0	0	0	0	0
Government Printing Office	2	2	100	0	0	0	0	0	0

Table 4: Disposition of Initial Appeals Adjudicated on the Merits by Agency

	Adjudicated[1]	Affirmed		Reversed		Mitigated Modified		Other	
	#	#	%	#	%	#	%	#	%
Agency for International Development	2	2	100	0	0	0	0	0	0
Department of Education	0	0	0	0	0	0	0	0	0
International Boundary and Water Commission	0	0	0	0	0	0	0	0	0
National Aeronautics and Space Administration	2	2	100	0	0	0	0	0	0
American Battle Monuments Commission	1	0	0	1	100	0	0	0	0
Armed Forces Retirement Home	0	0	0	0	0	0	0	0	0
Court Services and Offender Supervision	0	0	0	0	0	0	0	0	0
Railroad Retirement Board	0	0	0	0	0	0	0	0	0
Selective Service System	0	0	0	0	0	0	0	0	0
Equal Employment Opportunity Commission	0	0	0	0	0	0	0	0	0
Federal Emergency Management Agency	1	1	100	0	0	0	0	0	0
Tennessee Valley Authority	0	0	0	0	0	0	0	0	0
Broadcasting Board of Governors	0	0	0	0	0	0	0	0	0
Federal Labor Relations Authority	0	0	0	0	0	0	0	0	0
National Labor Relations Board	0	0	0	0	0	0	0	0	0
National Science Foundation	0	0	0	0	0	0	0	0	0
Office of Government Ethics	0	0	0	0	0	0	0	0	0
African Development Foundation	0	0	0	0	0	0	0	0	0
CIA	0	0	0	0	0	0	0	0	0
Commission on Civil Rights	0	0	0	0	0	0	0	0	0
Federal Communications Commission	0	0	0	0	0	0	0	0	0
Federal Housing Finance Agency	0	0	0	0	0	0	0	0	0
Federal Maritime Commission	0	0	0	0	0	0	0	0	0
Federal Retirement Thrift Investment Board	0	0	0	0	0	0	0	0	0
Federal Trade Commission	0	0	0	0	0	0	0	0	0
Government of the District of Columbia	0	0	0	0	0	0	0	0	0

Table 4: Disposition of Initial Appeals Adjudicated on the Merits by Agency

	Adjudicated[1]	Affirmed		Reversed		Mitigated Modified		Other	
	#	#	%	#	%	#	%	#	%
Judicial Branch	0	0	0	0	0	0	0	0	0
Merit Systems Protection Board	0	0	0	0	0	0	0	0	0
National Credit Union Administration	0	0	0	0	0	0	.0	0	0
Office of Special Counsel	0	0	0	0	0	0	.0	0	0
Other	0	0	0	0	0	0	.0	0	0
Pension Benefit Guaranty Corporation	0	0	0	0	0	0	.0	0	0
Securities and Exchange Commission	0	0	0	0	0	0	.0	0	0
TOTAL	895	657	73.4	199	22.2	32	3.6	7	.8

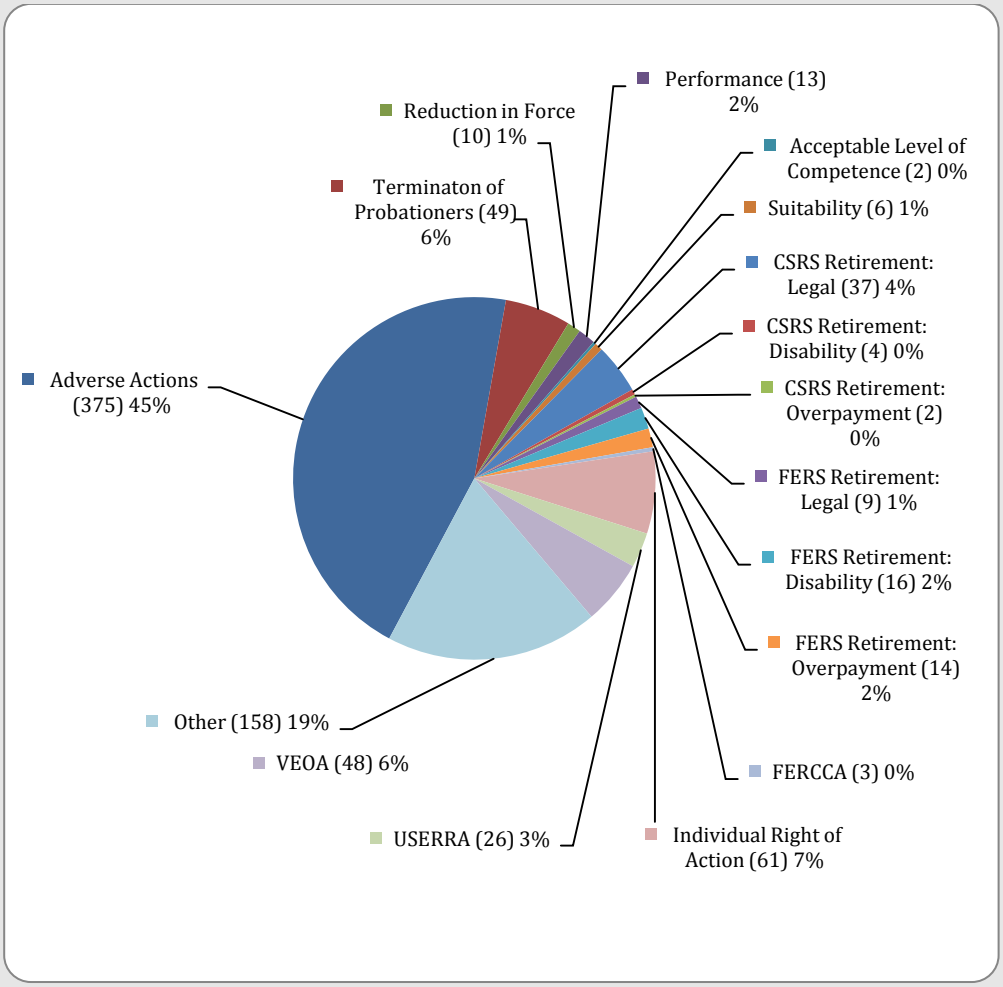
[1] Adjudicated, i.e., not dismissed or settled.
[2] Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.
Percentages may not total 100 because of rounding.

Headquarters Case Processing

Table 5: Disposition of Petitions for Review (PFR) of Initial Decisions by Type of Case

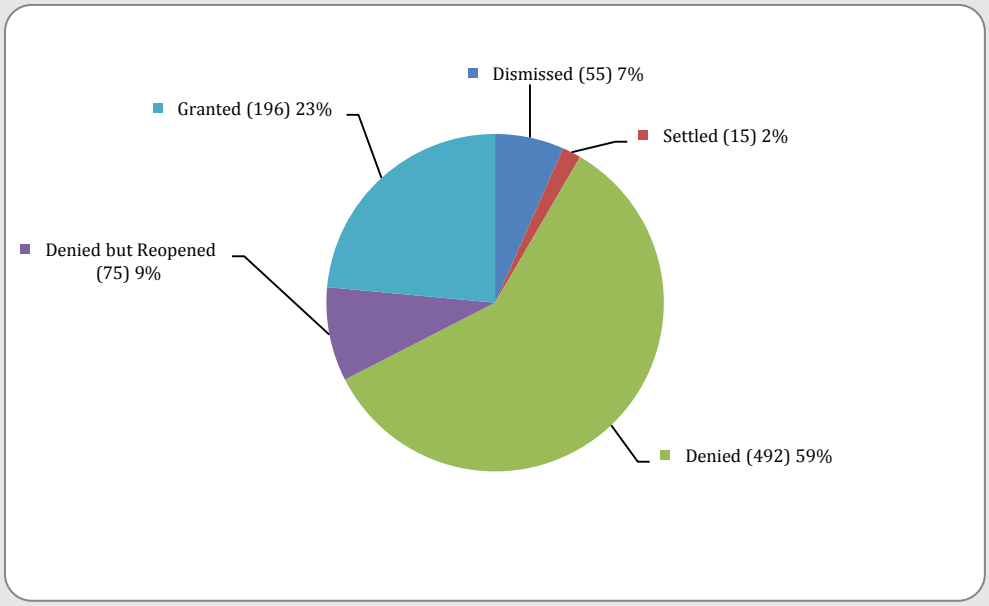
	Decided	Dismissed		Settled		Denied		Denied But Reopened		Granted	
Type of Case	**#**	**#**	**%**	**#**	**%**	**#**	**%**	**#**	**%**	**#**	**%**
Adverse Actions	375	20	5.33	8	2.13	226	60.27	38	10.13	83	22.13
Termination of Probationers	49	6	12.24	1	2.04	35	71.43	1	2.04	6	12.24
Reduction in Force	10	1	10.00	0	.00	1	10.00	7	70.00	1	10.00
Performance	13	0	.00	1	7.69	7	53.85	4	30.77	1	7.69
Acceptable Level of Competence	2	0	.00	0	.00	1	50.00	0	.00	1	50.00
Suitability	6	1	16.67	0	.00	3	50.00	1	16.67	1	16.67
CSRS Retirement-Legal	37	2	5.41	2	5.41	27	72.97	1	2.70	5	13.51
CSRS Retirement-Disability	4	1	25.00	0	.00	1	25.00	1	25.00	1	25.00
CSRS Retirement-Overpayment	2	0	.00	1	50.00	0	.00	0	.00	1	50.00
FERS Retirement-Legal	9	1	11.11	1	11.11	3	33.33	1	11.11	3	33.33
FERS Retirement-Disability	16	2	12.50	0	.00	10	62.50	0	.00	4	25.00
FERS Retirement-Overpayment	14	0	.00	0	.00	11	78.57	1	7.14	2	14.29
FERCCA	3	1	33.33	0	.00	1	33.33	1	33.33	0	.00
Individual Right of Action	61	2	3.28	0	.00	43	70.49	1	1.64	15	24.59
USERRA - Uniformed Services Employment Act	26	1	3.85	0	.00	19	73.08	2	7.69	4	15.38
VEOA - Veterans Employment Opportunity Act	48	3	6.25	0	.00	34	70.83	5	10.42	6	12.50
Other	158	14	8.86	1	.63	70	44.30	11	6.96	62	39.24
Total	**833**	**55**	**6.60**	**15**	**1.80**	**492**	**59.06**	**75**	**9.00**	**196**	**23.53**

Figure 4: Types of Petitions for Review (PFRs)



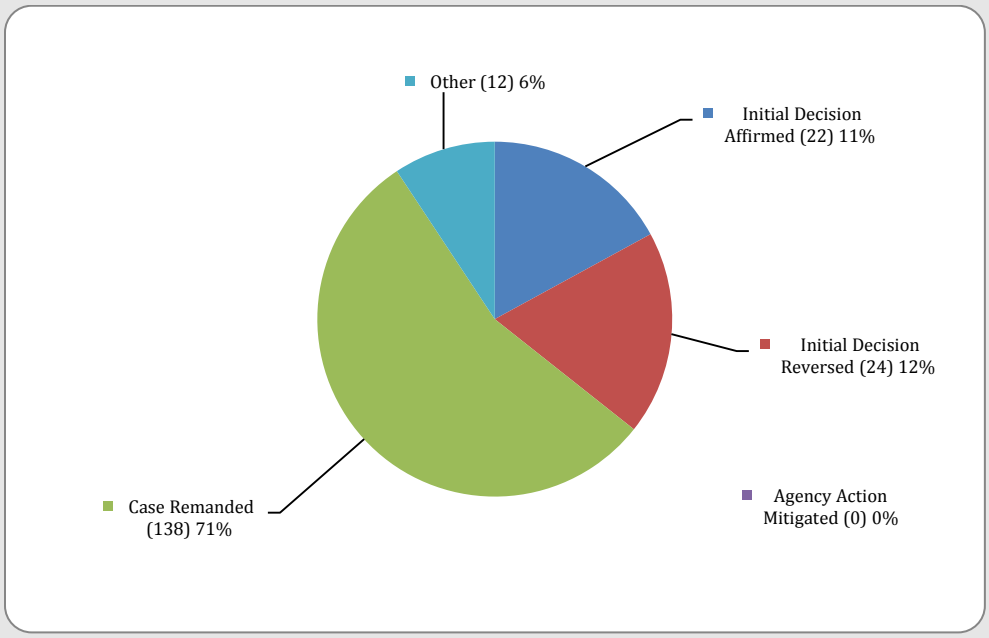
Total Number of Petitions for Review (PFR): 833

Figure 5: Disposition of Petitions for Review of Initial Decisions



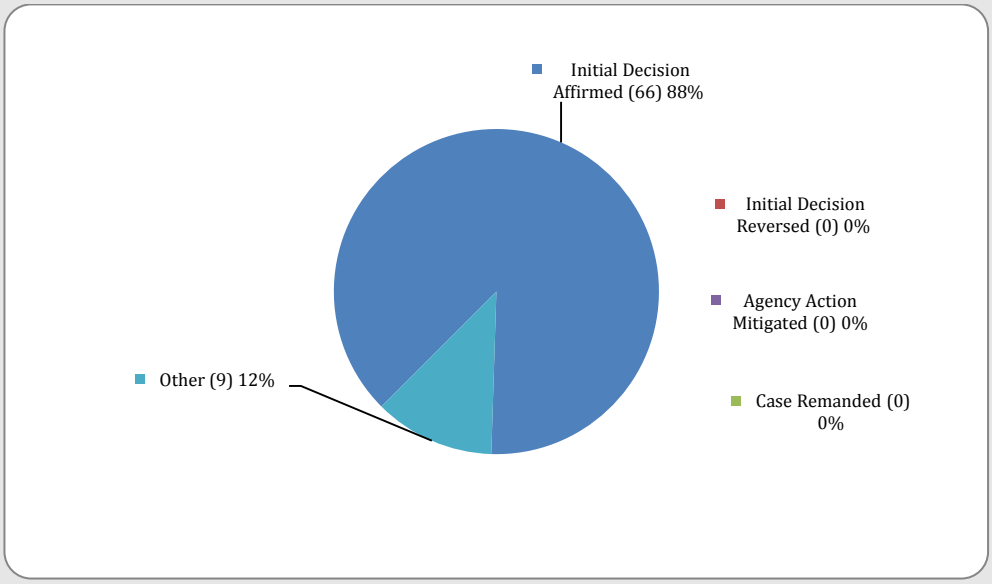
Total Number of PFRs: 833

Figure 6: Disposition of Petitions for Review Granted



Based on 196 PFRs Granted

Figure 7: Disposition of Petitions for Review Denied but Reopened



Based on 75 PFRs Denied but Reopened

Table 6: Disposition of Petitions for Review of Initial Decisions, by Agency

	Decided	Dismissed		Settled		Denied		Denied But Reopened		Granted	
	#	#	%	#	%	#	%	#	%	#	%
United States Postal Service	178	13	7.3	3	1.69	75	42.13	11	6.18	76	42.7
Department of the Army	95	7	7.37	4	4.21	57	60	9	9.47	18	18.95
Office of Personnel Management[1]	88	7	7.95	4	4.55	58	65.91	5	5.68	14	15.91
Department of Veterans Affairs	79	7	8.86	0	0	58	73.42	7	8.86	7	8.86
Department of Homeland Security	67	1	1.49	2	2.99	43	64.18	8	11.94	13	19.4
Department of the Navy	57	4	7.02	0	0	30	52.63	7	12.28	16	28.07
Department of Defense	43	3	6.98	0	0	29	67.44	2	4.65	9	20.93
Department of Justice	38	2	5.26	0	0	23	60.53	6	15.79	7	18.42
Department of the Air Force	33	2	6.06	0	0	23	69.7	3	9.09	5	15.15
Department of the Treasury	33	4	12.12	0	0	25	75.76	1	3.03	3	9.09
Department of Health and Human Service	19	0	0	0	0	8	42.11	7	36.84	4	21.05
Department of the Interior	16	2	12.5	0	0	8	50	2	12.5	4	25
Department of Agriculture	15	0	0	0	0	10	66.67	2	13.33	3	20
Department of Transportation	14	0	0	1	7.14	7	50	1	7.14	5	35.71
Department of Commerce	8	0	0	0	0	7	87.5	1	12.5	0	0
Department of State	8	1	12.5	0	0	6	75	0	0	1	12.5
Social Security Administration	8	0	0	0	0	5	62.5	1	12.5	2	25
Department of Labor	7	0	0	1	14.29	5	71.43	0	0	1	14.29
Department of Energy	4	0	0	0	0	2	50	0	0	2	50
Department of Housing and Urban Development	4	0	0	0	0	3	75	0	0	1	25
Pension Benefit Guaranty	4	0	0	0	0	0	0	0	0	4	100

Table 6: Disposition of Petitions for Review of Initial Decisions, by Agency

	Decided	Dismissed		Settled		Denied		Denied But Reopened		Granted	
	#	#	%	#	%	#	%	#	%	#	%
Corporation											
Environmental Protection Agency	2	0	0	0	0	1	50	0	0	1	50
General Services Administration	2	0	0	0	0	1	50	1	50	0	0
Smithsonian Institution	2	0	0	0	0	2	100	0	0	0	0
Armed Forces Retirement Home	1	0	0	0	0	1	100	0	0	0	0
Department of Education	1	0	0	0	0	1	100	0	0	0	0
Federal Deposit Insurance Corporation	1	0	0	0	0	1	100	0	0	0	0
Government Printing Office	1	0	0	0	0	0	0	1	100	0	0
National Aeronautics and Space Admin	1	0	0	0	0	1	100	0	0	0	0
Nuclear Regulatory Commission	1	0	0	0	0	1	100	0	0	0	0
Office of Management and Budget	1	1	100	0	0	0	0	0	0	0	0
Securities and Exchange Commission	1	0	0	0	0	1	100	0	0	0	0
Small Business Administration	1	1	100	0	0	0	0	0	0	0	0
TOTAL	833	55	6.6	15	1.8	492	59.06	75	9	196	23.53

[1] Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.
Percentages may not total 100 because of rounding.

Summaries of Merit Systems Studies

In FY 2012, MSPB completed three reports and published three editions of the *Issues of Merit* newsletter, which are summarized below.

Employee Perceptions of Federal Workplace Violence

Violence can occur in any workplace. When physical attacks, threats of attack, harassment, intimidation, or bullying occur in the workplace, organizations incur a number of direct and indirect costs. These costs include medical expenses, property restoration, psychological care for victims, and increased security, as well as higher employee turnover, reduced productivity, and lower employee commitment to their work or their organization. Some estimates have placed the costs of workplace violence to U.S. employers at billions of dollars every year.

Employee Perceptions of Federal Workplace Violence presented the results of a 2010 MSPB survey regarding Federal employee perceptions of violence in the Federal workplace. According to that survey, 13 percent of Federal employees observed an incident of physical assault, threat of assault, harassment, intimidation, or bullying over the preceding two years. The vast majority of these incidents were perpetrated by current or former Federal employees, rather than someone external to the organization. One-quarter of the violent incidents that Federal employees observed resulted in either physical injury or damage to/loss of property. Violence perpetrated by Federal employees resulted in physical injury or damage/loss of property the least frequently of all types of perpetrators.

Our findings indicate that a majority of survey respondents believe their agencies take sufficient steps to ensure their safety while at work. However, fewer respondents who observed violent acts by current or former Federal employees or by employees' abusive intimate partners agreed that their agencies take sufficient steps to ensure their safety than did employees who observed violent acts by other individuals.

Effective agency anti-violence programs may help reduce the number of incidents that occur and may mitigate the damage caused when an incident does occur. We recommend agencies ensure that their workplace violence prevention programs address violence caused by all perpetrators, specifically Federal employees. Such programs should allow for mitigation strategies to be developed at an appropriate organization level to take into account varying geographic locations, organizational missions, and occupational mixes. In addition, Federal managers should foster organizational cultures that do not tolerate violent behaviors and that take reports of such behaviors seriously. Also, improved data collection could help Federal agencies better allocate their limited resources against the sources of workplace violence.

Managing Public Employees in the Public Interest: Employee Perspectives on Merit Principles in Federal Workplaces

Managing Public Employees in the Public Interest: Employee Perspectives on Merit Principles in Federal Workplaces discusses Federal employee perceptions regarding the extent to which Federal agencies are adhering to the MSPs codified at 5 U.S.C. § 2301. Data from a recent survey conducted by MSPB indicate that Federal employees' perceptions that their work unit is successful in meeting the merit principles tend to vary by principle. When asked for their level of agreement with 25 questions

related to the MSPs, respondents were inclined to have fewer positive views for some questions associated with stewardship issues than for most questions associated with fairness or employee protections, although those two areas also showed room for improvement.

The stewardship questions that had the lowest level of positive responses focused on the extent to which management: (1) eliminates unnecessary functions and positions; and (2) effectively addresses poor performing employees. Respondents also expressed some concerns about the ability of organizations to retain good employees and agency support for necessary training. While these management responsibilities have always been important to the health of the merit systems, in the current fiscal environment it may be more necessary than ever for agencies to demonstrate that they are good stewards of the resources entrusted to them—including human capital. This report contains recommendations to address employee perceptions related to stewardship.

Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards

Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards examines motivation levels in the Federal workforce and discusses steps that Federal agencies can take to enhance employee engagement and performance. Federal employee motivation matters to both Federal agencies and the American people because Federal employees who report high levels of motivation are more likely to perform at a high level than their less-motivated coworkers. Consequently, understanding and sustaining employee motivation is critical to effective and efficient Government, especially in the current fiscal climate. A reassuring finding is that most Federal employees reported that they were motivated—more than 70 percent agreed with the statement, "I feel highly motivated in my work." However, MSPB also found opportunities for improvement in two areas.

The first area is job design. MSPB found that employees are likely to perform better when their jobs are meaningful, afford autonomy, and provide interesting and challenging assignments. For example, Federal agencies should design jobs in ways that enable Federal employees to make full use of their skills, which can subtly encourage them to share their insights and put forth their best efforts.

The second area is rewards. The good news is that Federal employees are not motivated primarily by monetary rewards, which is especially reassuring in a time of fiscal austerity. Federal agencies can make better use of rewards flexibilities by crafting rewards to be responsive to what employees value. In that regard, one particularly useful insight from our research is that most Federal employees valued interesting work and a sense of accomplishment more highly than they did cash awards or bonuses. As forces press for a more efficient and effective Federal workforce, our findings show that leaders should remain focused on the things that are important and have always been important to employee motivation.

Issues of Merit Newsletter

MSPB's *Issues of Merit* newsletter offers insights and analyses on topics related to Federal human resources management—featuring findings and recommendations from MSPB's independent research—to help improve the Government's merit systems. The newsletter's target audience includes Federal policy-makers, managers and executives, human resources professionals, social science researchers, and academics.

Each edition included findings from MSPB's research, information to help clarify readers' understanding of employment issues, and the OPE Director's perspectives on specific human capital matters. Articles related to specific MSPB studies addressed topics such as employee engagement, employee readiness for telework, case law for conducting reference checks, issues in hiring of inaccuracy and exaggeration in self-assessments of training and development, advancement of women in the Federal Government, violence in the workplace, and favoritism.

MSPB issued three editions of *Issues of Merit* in FY 2012, transitioning from four scheduled editions per year to realize cost savings and take fuller advantage of MSPB's public website. The newsletter will now be issued in September, when the pace of Federal work accelerates after the summer; in January, following the end-of-year holidays; and in May, just before the beginning of summer. The reduced print schedule will be balanced by making more content available through MSPB's website, such as rotating content on topical issues and "mini-briefings" summarizing findings and recommendations from MSPB studies.

This page intentionally left blank.

Significant Actions of the U.S. Office of Personnel Management

As required by statute, MSPB reviews and reports on the significant actions of OPM including an analysis of whether OPM's actions are in accord with merit system principles (MSPs, 5 U.S.C. §2301) and free from prohibited personnel practices (PPPs, 5 U.S.C. §2302). OPM's actions broadly affect the Federal workforce, multiple Federal agencies, or applicants for Federal jobs. The OPM significant actions MSPB reviews relate to or have the potential to directly or indirectly affect one or more of the MSPs or PPPs. Almost all OPM actions have the potential to impact the effectiveness and efficiency of the Federal workforce (MSP 5) and/or fair and equitable treatment in a variety of contexts (MSP 2). Depending on the nature of a particular OPM action, the action has the potential to affect or involve other specific MSPs and/or PPPs. Brief information about the additional MSPs and/or PPPs that may potentially be affected by a particular OPM action is included in the 'significance' section following each action. This report includes OPM's significant actions that involve human capital management policy (including OPM action in a case concerning MSPB's jurisdiction over appeals in actions taken for reasons related to national security) and delivery of services and benefits.

Human Capital Management Policy

Actions Related to Federal Recruitment and Hiring

This section summarizes selected OPM actions related to Federal recruitment and hiring, focusing on three elements of OPM's hiring reform initiative:

- Establishment of the Pathways Programs;
- Reducing time to hire; and
- USA Hire, an OPM-developed approach for assessing applicants for commonly-filled professional and administrative occupations.

Issuance of Final Regulations for the Pathways Programs

OPM issued final regulations[12] for the Pathways Programs[13] which became effective July 10, 2012. The intent is to streamline the hiring process and provide students and recent graduates—groups that OPM views as crucial to meeting the Federal Government's workforce needs—opportunities for training and potential permanent Federal employment.

To that end, the President exercised, through OPM, his statutory authority to except positions from the competitive service.[14] The final regulations establish a new component of the excepted service under title 5, United States Code. That component, Schedule D includes positions "…for which the competitive service requirements make impracticable the adequate recruitment of sufficient numbers of students attending qualifying educational institutions or individuals who have recently completed qualifying educational programs."[15] The final regulation creates three excepted service appointing authorities; an Internship Program, a Recent Graduates Program, and a Presidential Management Fellows Program collectively referred to as the Pathways Programs.

[12] Excepted Service, Career and Career-Conditional Employment, and Pathways Programs: Final Rules. Federal Register Vol. 77 No.92. Part III. 5 C.F.R. Parts 213, 302, 315 et al., May 11, 2012.
[13] U.S. Merit Systems Protection Board, Annual Report for FY 2011, pp. 51–53.
[14] 5 U.S.C. §3302
[15] 5 CFR §213.3401

As part of its justification for establishing the Pathways Programs, OPM contended that the groups targeted by the Pathways Programs, recent graduates in particular, are often disadvantaged by competitive examining. OPM's rationale is that because many agencies use ratings of training and experience to assess job applicants when conducting a competitive examination, students, and recent graduates who typically have minimal or no job-related work experience will receive lower scores than applicants with extensive experience, which may effectively eliminate them from consideration for appointment.

To guide agency implementation and address issues encountered with the Federal Career Intern Program (the predecessor of the Recent Graduates Program), OPM integrated five core principles into the Pathways Programs:

- Limited scope: In particular, the Pathways Programs are to be used "as a supplement to, and not a substitute for, the competitive hiring process;"[16]
- Transparency: Agencies must provide OPM with information about available Pathways Programs positions. OPM will then post the job announcement information on USAJOBS, a centralized website frequently consulted by Federal jobseekers;
- Fairness to veterans: Advertisement through USAJOBS will provide members of the public (including veterans) information about Federal employment opportunities. Also, veterans' preference rules apply to the Pathways Programs, and veterans may apply for opportunities in the Recent Graduates Program within six years of graduation (instead of within two years, which is the usual limit) if they were unable to apply because of military duty;
- Agency investment: Agencies are required to provide meaningful training to the students and recent graduates they select; and
- OPM oversight: Agencies must: (1) enter into a memorandum of understanding (MOU) with OPM prior to using the Pathways Programs. This MOU must be re-executed every two years; (2) designate a Pathways Programs Officer to serve as the point of contact with OPM; and (3) submit an annual report to OPM on their use of the Pathways Programs, to include information on both past appointments and projected use. Also, to prevent excessive use, OPM may establish limits on appointments under the Pathways Programs and on conversions of Pathways Programs participants to permanent Federal employment. The Director of OPM also retains authority to revoke an agency's use of the Pathways Programs.

Significance

As the final regulations are recent, it is too soon to tell how Federal agencies will implement and use the Pathways Programs, or how OPM will exercise its oversight authorities. We note that the final regulations are little changed, in most important respects, from the proposed regulations[17] that OPM issued in August 2011. Consequently, the broad issues and concerns that MSPB highlighted when discussing the proposed Pathways Programs in its 2011 Annual Report—such as the question of whether 5 U.S.C. 3302 authorizes exceptions to competitive examination that are, arguably, person-based rather than position-based—remain relevant.[18] MSPB plans to monitor implementation of the Pathways Programs closely. In addition to MSPs 2 and 5, the Pathways Program relates to hiring based on relevant qualifications to achieve a workforce that is representative of society, and advancement on the basis of relative ability, knowledge, skills (MSP 1).

---

[16] Executive Order 13562. Recruiting and Hiring Students and Recent Graduates. Vol. 75. No. 248. December 30, 2010.
[17] Excepted Service, Career and Career-Conditional Employment; and Pathways Programs, Action: Proposed rule with request for comments, 76 FR 47495-47514, August 5, 2011.
[18] U.S. Merit Systems Protection Board, Annual Report for FY 2011, pp. 51-53.

Reducing Time to Hire

OPM first focused on reducing the time to hire in 2008 as part of its End-to-End Hiring Initiative[19] and has maintained this focus under the Administration's hiring reform initiative.[20] OPM has found that agencies have varying ability to collect and analyze data, which affects the reliability and integrity of reported results. To provide more consistency across agencies, OPM has worked with a group of agency Chief Human Capital Officers (CHCOs) to develop guidelines for calculating time to hire.[21]

Significance

Although notable progress has been made to reduce the time to hire, it appears that few agencies are consistently meeting the goal of hiring employees in 80 or fewer calendar days.[22] As noted in previous MSPB reports, the length of the hiring process can contribute to Federal agencies losing good candidates who are not willing or able to wait.[23] OPM's guidance for reporting hiring results should lead to more reliable and usable calculations across the Federal Government, helping agencies gauge progress and make improvements to hiring processes. Reducing time to hire relates to MSPs 1, 2, and 5.

Pilot of USA Hire

As part of its hiring reform initiative, OPM created ASSESS (renamed USA Hire[24]) which has been an integrated technology-based approach for evaluating applicants for commonly-filled Governmentwide occupations. USA Hire was intended to directly support two goals of hiring reform: improved quality of hire and reduced time to hire. Features of USA Hire include:

- Online assessments: Either proctored or unproctored[25] online examinations;
- Assessments: A battery of tests that directly evaluate competencies, instead of using indirect measures such as descriptions of training and experience; and
- Portable results: After completing the tests, an applicant may use the results to apply for any position that requires the same test batteries.

When first introduced, OPM made ASSESS available to several pilot agencies without charge. Pilot testing will continue in FY 2013, but on a fee-for-service basis. OPM has indicated that it is evaluating a pricing structure that should be cost-effective and affordable for agencies.[26] OPM is currently developing metrics to evaluate the pilot and plans to use the resulting data to make improvements.

---

[19] Accessed at www.opm.gov/publications/EndToEnd-HiringInitiative.pdf, included a road map that established the goal of hiring employees in 80 or fewer calendar days, as measured by the time elapsed between the initiation of a hiring action to an official offer of employment.
[20] President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, Subject: Improving the Federal Recruitment and Hiring Process, May 11, 2010.
[21] Hire the Best Talent. Time to Hire.
[22] *Id.* 2 agencies out of 24 reported an average hiring time of 80 days or less; 13 reported average times of 101 days or more. The 80-day standard was established in OPM guidance for the End-to-End Hiring Initiative.
[23] U.S. Merit Systems Protection Board, In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees for Outside the Federal Government, February 2008; and U.S. Merit Systems Protection Board, Attracting the Next Generation: A Look at Federal Entry-Level New Hires, January 2008.
[24] This name is patterned after other OPM recruitment and staffing tools, notably USAJOBS (a Governmentwide recruitment and job posting portal) and USA Staffing (an automated hiring system).
[25] Unproctored (unsupervised) examinations allow applicants to take the assessment at any time, from any location.
[26] Based on communication with OPM representatives.

Significance

As of November 2012, USA Hire had been used to fill only a small number of positions (fewer than 80) in a limited range of occupations (primarily financial and information technology occupations).[27] Consequently, it is too soon to gauge the effects or success of this initiative. However, USA Hire appears to have potential to:

- Improve quality of hire: USA Hire's assessment battery includes test types—such as cognitive ability, job knowledge, situational judgment, and personality/biodata—that can, individually or in combination, better predict job performance than can point-method ratings of training and experience. Individual agencies may lack the expertise and time to independently develop or validate such tests. Thus USA Hire could help agencies more effectively assess and select applicants on the basis of relative ability;
- Reduce time to hire: Using technology to administer and score assessments can produce a list of qualified applicants more quickly than manual alternatives, particularly when there are large numbers of applicants;
- Provide economies of scale: If acceptance and use increase, USA Hire may be less costly for agencies than individually purchasing or developing and administering assessments; and
- Reduce the scope and use of exceptions to competitive examining: Direct assessment of competencies could eliminate or reduce the reported tendency of competitive examinations to disadvantage applicants with minimal or no job-related work experience.[28]

The Pilot of USA Hire relates to MSPs 1, 2, and 5.

Presidential Transition Guidance and Review Procedures for Placement of Political Appointees in the Career Service

On June 8, 2012, OPM Director John Berry sent a memorandum to agency leaders to remind them that "any appointments of political appointees, Schedule C employees, and Noncareer SES members to competitive or non-political excepted service positions or to career SES positions require careful attention to ensure they comply with merit principles regarding fair and open competition."[29] In addition to the Memorandum, OPM provided Guidelines on Processing Certain Appointments and Awards during the 2012 Election Period, Civil Service Rules; and Do's and Don'ts for Converting Political Appointees, Schedule C Employees and Noncareer SES Members to the Competitive or Non-Political Excepted Service. Several measures are in place to safeguard MSPs, including:

- OPM conducts a pre-appointment review and approval of any appointment of a current or recent political appointee to a position in the competitive service or the (non-political) excepted service;
- For potential appointments of a political appointee to the career SES, the agency conducts a Merit staffing review for compliance with MSPs and civil service laws prior to the submission to OPM for a similar compliance review, followed by submission of the candidates qualification to OPM's Qualifications Review Board (QRB) for evaluation of leadership competencies; and
- Suspension of QRB processing of proposed SES appointments when an agency head leaves or is replaced.

---

[27] *Ibid.*

[28] Excepted Service, Career and Career-Conditional Employment; and Pathways Programs, Action: Proposed rule with request for comments, 76 FR 47495-47514, August 5, 2011.

[29] John Berry, Director, U.S. Office of Personnel Management. Memorandum for Heads of Executive Departments and Agencies, Subject: Appointments and Awards During the 2012 Presidential Election Period. June 8, 2012.

Significance

Both career and noncareer employees are necessary to the effective operation of the Federal Government. However, it is imperative that the Federal agencies and Federal leaders recognize and respect distinctions between political appointees and career employees. In particular, as MSPB has stated previously, it is essential to ensure that appointments to career positions are made without regard to political affiliation.[30]

OPM has a vital role in preserving a merit-based career service, and the measures that OPM has established indicate that it recognizes this responsibility. In this regard, we note that OPM continues to review placements of political appointees into excepted service positions. Such review is both appropriate and necessary, in light of the number of positions in the excepted service and the fact that excepted-service employment often serves as a gateway to competitive service employment or operates as a functional equivalent to career employment in the competitive service. In addition to MSPs 1, 2 and 5, Presidential transition guidance relates to: employees maintaining high standards of integrity, conduct and concern for the public interest (MSP 4); and protecting employees against actions related to partisan political purposes (MSP 8). OPM's guidance also relates to the prohibitions against: discrimination on the basis of political affiliation (PPP 1); coercion of political activity, or taking any action as reprisal for or refusal of any person to engage in political activity (PPP 3); granting preference or advantage not authorized by law for the purpose of improving or injuring the employment prospects of any person (PPP 6); and discrimination for or against an employee on the basis of conduct not relating to job performance (PPP 10).

OPM Request for Reconsideration of *Conyers v. Department of Defense*

In *Conyers v. Department of Defense*,[31] The Board held that it has jurisdiction over an appeal of a suspension of more than 14 days of an employee who occupies a non-critical sensitive position but is not required to have a security clearance or access to classified information. Accordingly, the case was returned to the AJ for adjudication under the Board's usual adverse action standards instead of the limited review authorized for cases involving security clearances.

The Director of OPM exercised his authority under 5 U.S.C. § 7703(d) to seek judicial review of that decision from the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit granted review and determined that the Board erred, and that "[t]he core question is whether an agency determination concerns eligibility of an employee to occupy a sensitive position that implicates national security" and that the Board's role in reviewing the case was accordingly limited.[32] MSPB and the two appellants affected petitioned the Federal Circuit for an en banc rehearing of *Berry v. Conyers*.[33] On January 24, 2013, the court granted the petition for rehearing en banc, vacated their previous decision, and ordered new briefings on several issues in *Berry v. Conyers*.[34]

Significance

Petitions by OPM for review of Board decisions are rare, reflecting the requirement that the Director of OPM must first determine, before requesting judicial review, "that the Board

[30] U.S. Merit Systems Protection Board, Annual Report for Fiscal Year 2011, p.1.
[31] 115 M.S.P.R. 572, 11, 14 (2010).
[32] *Berry v. Conyers*, 692 F.3d 1223, 1237 (2012).
[33] In Fiscal Year 2013, the Board and the two appellants affected by the Federal Circuit's decision petitioned for an en banc rehearing in Berry v. Conyers, to which the Department of Justice responded on OPM's behalf.
[34] *Berry v. Conyers*, January 24, 2013 (No. 2011-3207).

erred…and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive."[35]

MSPB and OPM have expressed differing views on this case and on the proper interpretation of *Department of the Navy v. Egan*[36] in which the U.S. Supreme Court held MSPB is prohibited from reviewing the merits of an agency adverse action that is based on the denial, revocation, or suspension of a security clearance. However, both OPM and MSPB agree that the underlying issues—the appellate rights of employees who occupy non-critical sensitive positions, and (more broadly) how to balance agency authority to make determinations and take personnel actions necessary to national security with procedural requirements designed to protect the efficiency of the service and employee rights—are serious and far-reaching. In addition to MSP 5 and PPP 10, OPM's request for reconsideration of *Conyers v. Department of Defense* relates to retention of employees on the basis of performance (MSP 6).

Introduction of Standardized Performance Appraisal System for the Senior Executive Service

In January 2012, OPM (in coordination with OMB) announced[37] a new standardized Governmentwide performance appraisal system for members of the Senior Executive Service (SES).[38] This new system, which is to replace the multitude of systems currently employed by Federal agencies, is intended to provide "a more consistent and uniform framework to communicate expectations and evaluate the performance of SES members."[39] That consistency will support broader improvements in the SES, such as facilitating movement of executives across agencies, allowing agencies to share best practices, and enabling OPM to streamline its certification system for SES members.

The interagency workgroup[40] chartered by the President's Management Council (PMC) to coordinate development of this new system has standardized:

- The number of performance levels (five);
- Designations of the summary performance rating levels—one is the lowest rating level (unsatisfactory) through five, which is the highest rating level (outstanding);
- Performance standards and definitions;
- The method for deriving the summary rating; and
- The procedure for addressing poor performance.

SES performance appraisals are currently based on the Executive Core Qualifications (ECQs)—leading people, leading change, results driven, business acumen, and building coalitions. The new system retains the ECQs as performance measures, but shifts the focus from possession of

---

[35] 5 U.S.C. §7703(d)
[36] 484 U.S. 518 (1988).
[37] Memorandum from John Berry, Office of Personnel Management, Director and Jeffery Zients, U.S. Office of Management and Budget, Deputy Director for Management and Chief Performance Officer, Subject: Senior Executive Service Performance Appraisal System, dated January 4, 2012.
[38] The new performance management system includes career, noncareer, limited term, and emergency senior executives covered by subchapter II of chapter 43 of title 5, United States Code.
[39] Memorandum from John Berry, Office of Personnel Management, Director and Jeffery Zients, U.S. Office of Management and Budget, Deputy Director for Management and Chief Performance Officer, Subject: Senior Executive Service Performance Appraisal System, dated January 4, 2012.
[40] The interagency workgroup consist of members from OPM, OMB, DoD, Office of the Director of National Intelligence, Department of Energy, Department of Labor, Department of Health and Human Services, Department of Veterans' Affairs, Nuclear Regulatory Commission, and the Federal Energy Regulatory Commission.

competencies and technical expertise to achieving results through leadership. During FY 2012, approximately 10 agencies adopted the new SES performance management system.[41] An additional 25-30 agencies are expected to implement the system in FY 2013, with remaining implementing on October 1, 2013.[42]

Significance

Development of the new system involved identifying leading practices from the Federal and private sectors and incorporating them into the SES performance management system design. While the design may be sound, the real test for successful performance management systems lies in implementation and acceptance by individuals under the system (e.g., the perception of fairness).

The challenges in standardizing performance evaluations across agencies for the SES—indeed, for any segment of the Federal workforce—should not be underestimated. However, the benefits of success could be substantial because it would enable agencies—beginning with top-level leadership—to learn from experience, both as raters and ratees. Establishing a standardized, sound, and credible performance appraisal system for the SES could also lay the groundwork for broader reforms of employee performance management and, eventually, pay and recognition. In addition to MSPs 2, 5 and 6, OPM's introduction of a standardized performance appraisal system for the SES relates to equal pay for work of equal value with consideration of national and local rates paid by private employers, and ensuring appropriate incentives and recognition for excellent performance (MSP 3).

Application of the Performance Appraisal Assessment Tool (PAAT)

As part of its responsibility for strategic management of human capital, OPM continues to use the Performance Appraisal Assessment Tool (PAAT) to help agencies design and implement results-oriented performance appraisal systems.[43] The PAAT describes 10 characteristics of a successful system, which include:[44]

- Aligning employee performance plans with agency goals;
- Involving employees in the design of the system and the development of their performance plans;
- Holding employees accountable for achieving results—not only for behaviors or competencies; and
- Providing consequences for performance by recognizing and rewarding outstanding performance and addressing poor performance.

PAAT standards include objective (e.g., number of employees who receive ratings at each of the performance rating levels) and subjective (e.g., perceptions of various aspects of the appraisal system implementation) measures that provide multiple sources of feedback and indicators on where adjustment should be made to improve the appraisal system.[45]

---

[41] According to an OPM representative, the following agencies have adopted the new SES performance management system: VA, Labor, HUD, OPM, FTC, NTSB, FLRA, USAID-OIC, OMB, DOT-OIG.
[42] Based on communication with OPM representatives.
[43] System Assessment Tool: Performance Appraisal Assessment Tool, http://www.opm.gov/perform/PAAT/GS-PAAT-Instructions.pdf. The PAAT does not cover the Senior Executive Service, Senior Foreign Service, and the Foreign Service.
[44] *Ibid.* For a description of all performance appraisal characteristics.
[45] Agencies may use results from the Employee Viewpoint Survey (EVS) or their own survey that contain similar items designated in the EVS.

Significance

OPM correctly recognizes that developing an effective performance appraisal system requires regular review and continuing adjustment and refinement. This focus illustrates the importance of long-term commitment to improving performance appraisal systems. Since Fiscal Year 2007, the percentage of employees in Chief Human Capital Office (CHCO) agencies covered by appraisal systems that received scores between 70-84 points on the PAAT[46] has increased.[47] Results for Fiscal Year 2012 have not been published.

For reasons discussed in the MSPB's Annual Report for FY 2011—employee engagement, efficient uses of salary and award monies, and basis for retention, pay, and recognition— it is critical that agencies continue to improve performance management and that OPM continues to support them in their effort. Application of the PAAT relates to MSPs 3, 5, and 6.

Goals Engagement Accountability Results (GEAR) Pilot

In 2009, the National Council on Federal Labor-Management Relations (LMR Council) was created to "promote satisfactory labor relations and improve the productivity and effectiveness of the Federal Government."[48] Council members consist of the Director of OPM and the Deputy Director for Management of the Office of Management and Budget (OMB) as co-chairs, senior government officials, and representatives from Federal labor unions and management organizations.

In order to enhance its productivity, the LMR Council formed a workgroup comprised of representatives from a broad spectrum of functions related to employee or organization performance. The workgroup determined that issues of organizational performance and individual employee performance were so closely intertwined that both needed to be addressed simultaneously. In contrast to previous efforts, the workgroup did not recommend structural changes to existing performance management systems. Instead, it concentrated on practices and behaviors: communication between employees and supervisors; building trust to facilitate discussions of performance expectations in the context of strategic goals; providing timely and constructive feedback for short-term and long-term improvement; and discussion of employee development in conjunction with organizational needs. The workgroup also sought ways to improve the assessment, selection, training, and development of supervisors. The resulting recommendations, presented under the acronym GEAR (Goals, Engagement, Accountability, Results), were:[49]

- Articulate a high performance culture;
- Align employee performance management with organizational performance management;
- Implement accountability at all levels;
- Create a culture of engagement; and
- Improve the assessment, selection, development and training of supervisors.

---

[46] For more specific rating scheme on the PAAT, please refer to the Performance Appraisal Assessment Tool Scoring Sheet. July 2010. Accessed at: https://fehb.opm.gov/perform/PAAT/GS-PAAT-ScoringSheet.pdf

[47] U.S. Office of Personnel Management. Annual Performance Report for Fiscal Year 2011, p. 20. The percentage of employees in CHCO agencies who were covered by an appraisal system that scored least 80 points was 4% in FY 2007, 17% in FY 2008, 27% in FY 2009, and 28% in FY 2011.

[48] President Barack Obama, Executive Order 13522, Creating Labor-Management Forums to Improve Delivery of Government Services, 74 FR 66203-66205, December 9, 2009.

[49] National Council on Federal Labor-Management Relations, Employee Performance Management Workgroup, Report to the National Council on Federal Labor-Management Relations, Goals-Engagement-Accountability-Results: Getting in GEAR for Employee Performance Management, November 2011.

Significance

The focus and objectives of GEAR are consistent with MSPB's research on managing for engagement.[50] MSPB has found the necessary behaviors are practiced less often than is desirable, which may explain some stakeholder skepticism[51] about GEAR's prospects for success. However, such skepticism reinforces the need for improvement and the fact that behavioral and cultural change does not occur quickly and usually requires substantial and sustained attention. We further note that the LMR Council took a collaborative approach to examining the issues, developing recommendations, and identifying pilot agencies. That could yield greater agency and employee acceptance—and, ultimately, more positive and lasting change—than previous approaches, which have often been top-down and directive. The GEAR Pilot relates to MSPs 3, 5, and 6.

Advancing Federal Agency Use of Telework

The Telework Enhancement Act of 2010[52] (the Act) set forth specific requirements for agencies (*e.g.,* develop a policy, notify employees of telework eligibility, incorporate telework into continuity of operations plans, and designate a Telework Managing Officer).[53] In addition to these requirements, the Act encourages agencies to establish other telework program goals—such as to facilitate recruitment and retention, reduce real estate cost, and reduce air pollution and energy consumption—and to measure progress toward achieving those goals.

The Act charged OPM with supporting and monitoring agency implementation of the Act's requirements and objectives.[54] In that capacity, OPM published the report *2012 Status of Telework in the Federal Government* in June 2012. This report covers agency progress toward satisfying requirements of the Act; identification of benefits and barriers to telework; and examples of practices to increase benefits derived from telework. OPM reported that agencies have made substantial progress (for example, at the time information was collected for the report, 75 out of 87 agencies had incorporated telework in their continuity of operations plans),[55] but acknowledged that "the final combined telework participation estimates are unlikely to be reliable" because not all agencies have staff trained to perform the function and agencies use different methods to collect data.[56] Accordingly, OPM has worked with agencies to develop Governmentwide standards for automated data collection and pilot-tested a revised data collection process in the summer of 2012.[57]

Significance

OPM continues to actively assist Federal agencies in meeting the Act's requirements and promoting the use of telework to maximize its benefits. Examples of the guidance and tools provided by OPM are: a guide to telework;[58] illustrations of how some agencies have set telework goals and identified

---

[50] U.S. Merit Systems Protection Board, Managing for Engagement-Communication, Connection, and Courage, July 2009.
[51] Federal Daily News. New Performance Management System More of the Same, Labor Leader Says. January 19, 2012. John Gage, then president of the American Federation of Government Employees, said he "did not see how the GEAR program—for goals, engagement, accountability and results—was any different from existing performance management systems."
[52] Pub. L. 111–292.
[53] 5 U.S.C. §6502.
[54] 5 U.S.C. §6504.
[55] U.S. Office of Personnel Management, 2012 Status of Telework in the Federal Government: Report to the Congress, June 2012, p.32.
[56] *Id.* (p. 7).
[57] *Id.* (p. 10).
[58] U.S. Office of Personnel Management, Guide to Telework in the Federal Government, April 2011.

metrics for measuring progress and practices for capturing necessary data;[59] interactive web-based training for employees and managers;[60] and guidance that incorporates telework into dismissal and closure procedures for the Federal Government in the Washington, D.C. area.[61]

OPM leadership could aid and accelerate the integration of telework into routine agency operations. Fuller integration of telework into agencies' business strategies—beyond contingency and emergency planning—is essential if the Federal Government is to realize the full potential of telework to benefit agencies and employees and contribute to efficient and effective use of the Federal workforce.[62] Advancing Federal agency use of telework relates to MSPs 1, 2, and 5.

Expansion of HR University

In 2010, the Chief Human Capital Officers (CHCO) Council and OPM established HR University (HRU), a Federal Governmentwide training resource to assist Federal HR professionals.[63] The goals of HR University are to:

- Address competency and skill gaps within the Federal HR community, to enable HR professionals to function as "strategic business partners" rather than processors of transactions;
- Achieve savings through shared resources and economies of scale; and
- Identify and provide best-quality HR training across the Federal Government.

Since its inception, HRU has registered 15,000 users, posted over 99 courses, and been used by over 28 Government agencies.[64] OPM continues to expand course offerings, which now include some college-level courses.[65] Many courses are free or low cost, and OPM estimates that HRU has achieved approximately $18.6 million in cost savings.[66]

Significance

For several years, Chief Human Capital Officers (CHCOs) and the broader HR community have expressed concern that Federal HR professionals lack the competencies needed to succeed in a changed environment.[67] Because HR professionals implement and influence programs including

---

[59] U.S. Office of Personnel Management, 2012 Status of Telework in the Federal Government: Report to the Congress, June 2012.
[60] The training courses Telework 101 for Employees and Telework 101 for Managers may be accessed and viewed through www.telework.gov.
[61] John Berry, Director, U.S. Office of Personnel Management, Memorandum for Heads of Executive Departments and Agencies, "Subject: Washington, DC Area Dismissal and Closure Procedures," December 15, 2010 and John Berry, Director, U.S. Office of Personnel Management, Memorandum for Heads of Executive Departments and Agencies, "Subject: Update to Washington, DC Area Dismissal and Closure Procedures," March 3, 2011.
[62] This is consistent with findings in U.S. Merit Systems Protection Board, Telework: Weighing the Information, Determining an Appropriate Approach, October 2011.
[63] Accessed at www.hru.gov.
[64] The number of registered users and number of available courses are based on a review of www.hru.gov on November 2, 2012. Agency participation in HRU is based on the U.S. Office of Personnel Management. News Release: CHCO Council Receives Training Officers Consortium Award for its Work on HR University. July 5, 2012.
[65] Statement of John Berry, Director, U.S. Office of Personnel Management, "Investing in an Effective Federal Workforce," before the United States Senate, Subcommittee on Oversight of Government Management, The Federal Workforce And The District Of Columbia, September 19, 2012.
[66] *Id.* As of November 2012, information on the cost savings calculation is available www.hru.gov, under the frequently asked questions (FAQs).
[67] Partnership for Public Service. Building a Federal HR Workforce for the 21st Century. Report from an Action Planning Dialogue at the CHCO Council Fall Innovation Forum. September 30, 2010.

recruitment and placement, employee benefits, classification, compensation, performance management, employee relations, and labor relations, their advice and actions can have far-reaching consequences for both agencies and employees. HRU can help agencies develop HR professionals who have the skills needed to design and implement HR policies and practices that are consistent with law and merit system principles, supporting a Federal Government that works efficiently and effectively to serve the public interest. The expansion of HR University relates to MSPs 5 and 7.

Implementation of Phased Retirement

Since 2010, the number of Federal employee retirements has been on the rise.[68] To facilitate the transfer of technical and institutional knowledge while allowing employees to make a less abrupt transition into retirement, Congress approved legislation to provide Federal employees an option for phased retirement, which was signed into law on July 6, 2012.[69] As envisioned, employees at the end of their careers would be allowed to work part-time, receiving a reduced salary and a partial retirement annuity. In exchange, they would spend a portion of their time mentoring less-experienced employees and aiding succession planning.[70] While it is not anticipated that large numbers of employees would be interested in this arrangement, agencies retain the right to determine which employees can participate.[71] OPM is currently drafting implementing regulations, which will be submitted to OMB for review prior to issuance for public comment.[72]

Significance

Phased retirement, once implemented, could be a useful tool to retain valuable, highly-experienced employees for a limited time and to help less-experienced employees prepare for new roles and responsibilities. We caution that phased retirement is not a substitute for workforce planning and succession management, areas in which the Federal Government's planning and execution have often been lacking. However, phased retirement, if properly used, should contribute to efficient and effective use of the Federal workforce. For example, phased retirement could reduce disruption of mission-critical functions that can result from employee retirements, especially when such retirements coincide with—or are driven by—organizational downsizing and restructuring. The implementation of phased retirement relates to MSPs 3 and 5.

Guidance on Diversity and Inclusion

In August 2011, President Obama issued an Executive Order on diversity and inclusion (D&I) in the Federal Government that directed OPM to develop, in coordination with the Office of Management and Budget (OMB), the President's Management Council (PMC), and the Equal Employment Opportunity Commission (EEOC), a Governmentwide strategic plan for diversity and inclusion. That strategic plan,[73] which directed Federal agencies to develop agency-specific D&I

---

[68] Based on retirement statistics reported by the U.S. Office of Personnel Management. As of November 2012, retirements for 2000 through 2011 were reported at www.opm.gov/retire/statistics.aspx; claims received through October 2012 were reported at www.opm.gov/StrategicPlan/pdf/RetirementProcessingStatus.pdf. Claims received through October 2012 (approximately 94,800) exceeded the number of new annuitants for all of 2011 (approximately 82,800).

[69] Pub. L. 112-141, the Moving Ahead for Progress in the 21st Century Act ("MAP-21"), §100115.

[70] U.S. Office of Personnel Management. Congressional Budget Justification and Annual Performance Plan FY 3013.

[71] Frequently Asked Questions (FAQs) related to phased retirement, available as of November 2012 at http://www.opm.gov/FAQS/Search.aspx?q=phased%2bretirement.

[72] Based on discussion with representatives from OPM.

[73] U.S. Office of Personnel Management, Government-Wide Diversity and Inclusion Strategic Plan 2011, accessed in November 2012 at www.opm.gov/diversityandinclusion/reports/.

strategic plans, was issued in November 2011, accompanied by guidance[74] on those agency-specific plans. In March 2012, 55 agencies submitted their D&I Strategic Plans to OPM.

OPM has identified, through its research, four elements of successful D&I plans: (1) diversity councils, (2) mentoring, (3) work/life balance, and (4) diversity in senior leadership. OPM review of those plans reveals that inclusion of these elements varies. For example, most agency plans included work/life programs, but relatively few addressed how to ensure diversity within the agency's senior ranks. This is the first year that agencies have been required to develop D&I plans, and OPM anticipates that future plans will be better aligned with what it believes to be best practices.[75]

Significance

Striving for diversity and inclusion is fully consistent with the MSPs, and with the vision of a Federal Government that is representative, focused on the public interest, and efficient and effective. The concept of diversity in the plan and guidance extends beyond traditional dimensions (e.g., race and national origin, sex, ethnicity, age, religion, and disability), to encompass differences such as socio-economic status, sexual orientation, and education. This broader conception more fully reflects the ways that citizens and employees can differ, and acknowledges that a workforce that is truly "representative of all segments of society" is diverse in ways beyond those explicitly enumerated in civil rights and other statutes.

An emphasis on inclusion is also consistent with, and supportive of, MSPs. Efficient and effective use of the workforce—which implies taking full advantage of the perspectives and experiences that employees can bring to bear on organizational goals and challenges—requires more than a workforce that resembles American society. It demands workplaces in which employees believe that they are respected and are able to make full use of their talents and insights.[76] OPM's guidance provides a framework for agencies to identify barriers to creating such workplaces, and to take specific actions to overcome those barriers. OPM's guidance on diversity and inclusion relates to MSPs 1, 2, 4, 5, and 6 and PPP 10.

Extension of Certain Benefits to Same-Sex Partners

On July 20, 2012, OPM issued final regulations[77] to extend some Federal benefits to same-sex partners of Federal employees. Under the regulation, same-sex partners are:

- Presumed to have an insurable interest for a survivor annuity;
- Eligible for noncompetitive appointment based on overseas employment; and
- Eligible for child care subsidies offered to lower-income civilian employees.

OPM also issued a proposed rule[78] to amend the Federal Employees Health Benefits Programs to allow the children of a Federal employee and same-sex partner to receive health benefits, including dental and vision insurance.

---

[74] http://www.opm.gov/diversityandinclusion/reports/DIAgencySpecificStrategicPlanGuidance.pdf
[75] Based on discussions with OPM representatives in October 2012.
[76] A rationale for diversity in the Federal Government, from a research and merit systems perspective, can be found at U.S. Merit Systems Protection Board. Fair and Equitable Treatment: Progress Made and Challenges Remaining, December, 2009.
[77] Presumption of Insurable Interest for Same-Sex Domestic Partners 77 Fed. Reg. 42909 (July 20, 2012).
[78] Federal Employees Health Benefits Program and Federal Employees Dental and Vision Insurance Program: Expanding Coverage of Children Federal Flexible Benefits Plan: Pre-Tax Payment of Health Benefits Premiums 77 Fed. Reg. 42914 (July 20, 2012).

Significance

Expanding the availability of benefits to same-sex partners could help the Federal Government maintain a contemporary and competitive benefits package, and support the Federal Government's need to have a qualified and diverse workforce and inclusive workplaces. At the signing of an earlier memorandum granting some benefits to same-sex partners, President Obama stated that "Those companies recognize that offering (same-sex) partner benefits helps them compete for and retain the brightest and most talented employees. The Federal government is at a disadvantage on that score right now, and change is long overdue."[79] However, there are limits to what can be achieved through executive or administrative action; legislation will be necessary before the Federal Government can offer full benefits.[80] The extension of certain benefits to same-sex partners involves MSPs 1, 2, and 5, and PPP 1.

Delivery of Services and Benefits

Establishment of New Strategic Goal: Improve Access to Health Insurance

In FY 2012, OPM added the strategic goal of "Improve access to health insurance"[81] to the four strategic goals it established in 2010.[82] This goal encompasses responsibilities assigned to OPM under the Patient Protection and Affordable Care Act (ACA), which include:

- Implementation and oversight of at least two multi-state health plan options to be offered through affordable insurance exchanges beginning in 2014. The multi-state plans will be one of the health insurance options available to small businesses and uninsured individuals;
- Extending eligibility of insurance coverage through the Federal Employee Health Benefits Program and the Federal Employee Group Life Insurance Program to tribes and tribal organizations.

Significance

This new strategic goal—in particular, implementing multi-state health plans—may indirectly affect OPM's strategic goals related to Federal human capital management and related significant actions, which in turn could potentially affect some or all of the MSPs or PPPs.

Introduction of USAJOBS 3.0

USAJOBS (www.USAJOBS.gov) is the Federal Government's main portal for information about Federal employment opportunities. In conjunction with its hiring reform initiative, OPM worked with agencies to identify information needs, then used in-house staff to design and build USAJOBS 3.0. When USAJOBS 3.0 was implemented in October 2011, OPM experienced significant technical problems, and concerns about system access and usability were widespread and highly publicized.[83] According to the ForeSee E-Government Satisfaction Index—based on survey data from approximately 300,000 users of 190 Federal websites—the satisfaction score dropped sharply after the 3.0 version was released. The range of satisfaction scores is from 1 to 100; a score of 80 or higher is considered superior because it can only be achieved if the organization meets or exceeds

---

[79] Ed O'Keefe. *Obama Extends Benefits to Same-Sex Partners*. The Federal Eye. June 2009.
[80] For example, The White House, Office of the Press Secretary. Memorandum for the heads of executive Departments and Agencies, Subject: Extension of Benefits to Same-Sex Domestic Partners of Federal Employees. June 2, 2010.
[81] U.S. Office of Personnel Management. *A New Day for Federal Service*. Updated for 2012 -2015.
[82] U.S. Office of Personnel Management. FY 2011 Congressional Budget Justification. February 2010.
[83] Alice Lipowicz, *USAJobs.gov 3.0 reboot getting fail reviews from users*, Federal Computer Week, Oct. 12, 2011 and Patrick Thibodeau, *USAjobs.gov struggles after feds take it back from Monster.com*, Government IT, Oct. 21, 2011.

user expectations.[84] Prior to implementation of USAJOB 3.0, the satisfaction scores for the first three quarters of 2011 varied between 74 and 75. After the launch of USAJOBS 3.0, the satisfaction score fell to 56. Since then, satisfaction has risen steadily, although it has yet to reach the level attained prior to the launch of version 3.0. As of November 2012, the most recent available satisfaction score was 72.

Significance

USAJOBS is a widely-used website that receives over 3 million visits per week. While the content of the job announcement is under agency control, it is critical that OPM designs and maintains a site that users find navigable and functional. Satisfaction scores indicate that OPM has addressed the problems that arose at introduction. However, the importance of USAJOBS extends beyond functionality. The impression that USAJOBS makes can affect users' perceptions of the Federal Government, willingness to complete the job search and application process, and comments and recommendations made to others. For USAJOBS 3.0 to be a complete success, user satisfaction should reach or exceed the levels previously attained. To that end, OPM will need to focus continued attention on the user experience, as well as various elements of the hiring reform initiative, such as job announcements and application processes and requirements, for which Federal agencies (rather than OPM) have primary responsibility. In addition to MSPs 2 and 5, USAJOBS 3.0 primarily involves MSP 1.

Reducing the Number of Pending Retirement Claims

For FY 2010, OPM reported a substantial increase in both retirement claims processing time and in the number of pending claims,[85] reflecting both external factors (such as an increase in retirement claims driven by an aging workforce and agency restructuring) and internal factors (such as staff losses and the discontinuation of an unsuccessful modernization initiative).[86] To rectify this situation, OPM instituted an approach[87] with four elements ("pillars"):

- People: OPM hired staff in two functions: claims processing, performed by Legal Administrative Specialists (LASs); and responding to customer inquiries, performed by Customer Service Specialists (CSSs);
- Productivity and process improvement: OPM conducted a study of claims processing and made changes based on its analysis. One such change was shifting the task of gathering data needed for claims processing to CSSs, freeing LASs to perform more technical work;
- Partnering with agencies: OPM trained agency benefits officers on common errors and how to avoid them, and provides monthly feedback on the completeness and deficiencies of the claims submitted for processing; and
- Progressive information technology improvements: OPM is making incremental changes to make greater use of technology and automation.

---

[84] Commentary and analysis by Larry Freed. *Making the Case for E-Gov.* ForeSee Results ACSI E-Government Satisfaction Index (Q1 2011). April 26, 2011. Specific satisfaction scores for USAJOBS 3.0 may be accessed through the ForeSee website. Contact information from users may be requested prior to viewing the data.
[85] U.S. Office of Personnel Management, Fiscal Year 2010 Annual Performance Report, pp. 37-39.
[86] *Id.* and testimony of John Berry, Director, U.S. Office of Personnel Management, to the U.S. House of Representatives, Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy, "Back to the Basics: Is OPM Meeting its Mission?," November 15, 2011.
[87] U.S. Office of Personnel Management, Congressional Budget Justification and Annual Performance Plan Fiscal Year 2013.

OPM has reduced the retirement claims backlog from 61,108 cases in January 2012 to 26,402 cases in December 2012.[88]

Significance

OPM anticipates a continued increase in retirement claim submissions for issues related to the two-year pay freeze, an increase in retirement eligible Federal employees, proposed changes to the retirement system, and agency use of Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Payments (VSIP) for workforce restructuring.[89] As we noted in our Annual Report for FY 2011, OPM's ability to deliver timely and accurate benefits does not only affect retirees. As stated, it "indirectly affects public trust in government, agencies' ability to recruit employees and restructure their workforces, and the credibility and effectiveness of OPM leadership in other areas."[90] It is, therefore, important that OPM continue to make progress toward reducing the backlog and meeting its July 2013 goal of processing 90% of the retirement claims received within 60 days. Reducing the number of pending retirement claims relates to MSPs 1, 3, and 5.

[88] Retirement Processing status.
[89] Based on communication with OPM representatives.
[90] U.S. Merit Systems Protection Board, Annual Report for FY 2011, April 2012, p.66.

This page intentionally left blank.

Financial Summary

Fiscal Year 2012 Financial Summary
(dollars in thousands)

Financial Sources	
Appropriations	$ 40,258
Civil Service Retirement and Disability Trust Fund	2,345
Other reimbursements & FY 11 Carryover Funds	493
Total Financial Sources	$ 43,096
Obligations Incurred	
Personnel Compensation	$ 24,164
Personnel Benefits	6,445
Travel of Things	34
Travel of Persons	303
Rental Payments	3,300
Communications, Utilities, and Miscellaneous	1,026
Printing and Reproduction	121
Other Services	2,381
Supplies and Materials	161
Equipment	588
FY 11 Carryover Obligations & Other Reimbursable	303
Reimbursable Obligations	2,345
Total Obligations Incurred	$ 41,171

This page intentionally left blank.